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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD ELLIS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ALLEN L. FAILS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX — VOLUME III

MICHAEL E. MERRILL
MERRILL AND SCHULTZ,
Attorneys at Law
RAYMOND J. LaJEUNESSE, JR., ESQ.
National Right to Work Legal
Defense Foundation
By Michael E. Merrill
4420 Hotel Circle Court, Suite 345
San Diego, California 92108
(619) 293-3722
Counsel for Petitioners

WILLIAM DONLON
General Counsel, BRAC
8 Research Place
Rockville, Maryland 20850
Counsel for Respondents
(Continued)

PETITION FOR CERTIORARI FILED JANUARY 7, 1983.
CERTIORARI GRANTED APRIL 18, 1983.

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JOSI 'H L. RAUH, JR.
JOHN SILARD
HARRIETT R. TAYLOR
RAUH, SILARD and LICHTMAN
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-1795

FILED

JAN 9 1976

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

BODLE, FOGEL, JULBER, REINHARDT
and ROTHSCHILD
GEORGE E. BODLE
STEPHEN REINHARDT
LESTER G. OSTROV
JOEL N. KLEVENS
5900 Wilshire Boulevard, Suite 2600
Los Angeles, California 90036
(213) 937-6250

SOLOMON I. HIRSH
WILLIAM J. DONLON
6300 River Road
Rosemont, Illinois 60018
(312) 692-7711

JAMES L. HIGHSAW
HIGHSAW and MAHONEY
1015 18th Street, N.W., Suite 506
Washington, D.C. 20036
(202) 833-2020

Attorneys for Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al.,
Plaintiffs,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

CIVIL NO. 73-113-N

Consolidated with

CIVIL NO. 73-118-N

AFFIDAVIT OF WILLARD WIRTZ

ALLEN FAILS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

COUNTY OF MONTGOMERY)
STATE OF MARYLAND) SS.:

WILLARD WIRTZ, being duly sworn, deposes and states as follows:

1. I am a resident of the District of Columbia. It is relevant here that between 1962 and 1969 I served as Secretary of Labor of the United States, that from 1970 to 1973 I was a Trustee in Bankruptcy of the Penn-Central Railroad, and that I have had a good many years experience in the area of labor relations, as attorney, teacher, arbitrator and in other capacities.

Defendants in a litigation challenging compulsory union dues payments to the Brotherhood of Railway Clerks have asked me to make this affidavit, particularly concerning the plaintiffs' proposition that compulsory union dues authorized by Section 2, Eleventh, of the Labor Railway Act are confined in the case of any objecting employee to the union's expenditures in collective bargaining with his individual employer.

2. Although a system of collective bargaining exclusively on an employer-by-employer basis exists in some countries, this is not true in the United States. Such a system, broadly employed in Japan, has been called "entrepreneurial" or "enterprise" unionism; there an employer bargains with a local union which is unaffiliated with a national union. Although such a scheme does exist in some cases in the United States, it is unrepresentative and does not possess the peculiar characteristics of the Japanese system. Thus, the hallmark of Japanese bargaining is guaranteed life-long employment, a product of Japanese history and culture.

3. National unionism has been, almost from the very beginning, a

central feature of collective bargaining in the United States. This has been true notwithstanding enormous variations in product and labor markets, which in many cases have created exceptionally powerful local unions. The national unionism pattern is the product of several historical developments. The first nationalization catalyst was the felt need for benefits such as life, disability and health insurance, out-of-work payments, survivors benefits, and the like. Nearly all of the older unions developed such programs in their early years; despite the development of Social Security and employer-financed group programs these benefit plans continue today to serve significant functions.

An early scholar has described the role of such union benefits: "The insurance features have further been the means of securing and retaining members and thus building up the railway organizations as factors in collective bargaining. The power of the brotherhoods to secure satisfactory agreements with their employers is largely measured by the strength of the organizations, and that strength is usually in direct proportion to the development of their insurance systems. Thus, not only is insurance a prime support in collective bargaining of the unions; but it insures control in the exercise of that function. The infrequency of railroad strikes may have contributed to the almost perfect control of the head officials of the brotherhoods over their membership." J. B. Kennedy, "The Beneficial Features of the Railway Unions" in *Studies in American Trade Unionism*, ed. by J. H. Hollander and George E. Barnett, New York, 1906, pp. 348, 349.

From its origins to the present day, the central function of national unionism has been to provide aid to the constituent local units. This assistance typically includes furnishing advice and leadership in difficult local situations. The national union provides funds to support its affiliates during strikes or other emergencies. Such assistance is costly, and is financed from the national union's general revenues. However remote a local union may be in terms of geography or product market from the center of an industry, it may usually rely upon the national union's concern with the outcome of its local bargaining effort. The union slogan "An injury to one is an injury to all" reflects this interdependence.

5. One of the strongest impulses to national union organizations stems from the situation of the unionized employers who compete with the unorganized employers. No meaningful economic improvement is possible, and union representation itself is jeopardized, if substantial numbers of lower-paid workers remain employed in the industry. Indeed,

the original impulse to organize national unions arose from the widening of product markets. A classic description of this process was given in 1909 by John R. Commons in "American Shoemakers, 1648-1895: A Sketch of Industrial Evolution" (Quarterly Journal of Economics, November, 1909, pp. 39-84). Cf. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921).

6. A supportive reason for the growth and development of national unions was the necessity of dealing with the "traveling members" of local unions. Americans have always been a mobile people, and the movement of large numbers of skilled workers searching for jobs endangered the job security and working conditions of local workers. The national union alone is able to impose that discipline upon its traveling members, which is essential to the orderly functioning of collective bargaining. The *quid pro quo* which employers receive is a work force which will abide by the union agreement. The leading authority on the history of national unionism considers this discipline factor as the single most important reason for the growth of the national union. See Lloyd Ulman, *The Rise of the National Union*, Cambridge, 1955.

7. The interdependence of local unions aligned in a national organization is also exemplified by employer bargaining strategy. Commonly, separate units of the same employer negotiate different agreements. The Taft-Hartley Act forbids unions from insisting upon a consolidation of units, despite the obvious community of interests. But far more important is the place of association bargaining. Section 9(b) of the National Labor Relations Act means that multi-employer bargaining exists essentially at the sufferance of the employers. Moreover, since in dealing with wages and working conditions employers are as immune from antitrust restraints as are the unions, informal as well as formal combinations of employers are widely employed for bargaining purposes.

In the transportation sector, the coordination of collective bargaining serves the interests not only of the employees but also of employers. Accordingly, employers joined together many years ago for multi-employer bargaining with the nation's major railroad unions. The basic working rights of the transportation employees in various craft or skill categories have thus typically been resolved on a nationwide basis by multi-employer bargaining. The mutual aid plans among the railroads and the airlines, protecting each other against strike losses, demonstrate the extent to which the employers themselves have recognized their interdependency in collective bargaining.

8. The 1971 ruling by the United States Court of Appeals for the District of Columbia Circuit in *Delaware and Hudson Railway Co. v. United Transportation Union*, 450 F.2d 603, 608 was that while national resolution of disputes between carriers and unions is not expressly compelled by the Railway Labor Act, it is nevertheless obligatory in some circumstances "depending on the issues involved and the 'practical appropriateness of mass bargaining' for those issues and the 'historical experience' in handling similar national movements." The interdependence both of the employees and the employers is further underscored by the judicial confirmation in the *Delaware and Hudson* case (at 614) that by lockout action "carriers may make a national response to defend against a selective strike" against a single carrier.

9. These considerations underscore the unrealism of any effort by a union to advance the interests of workers of an employer in any major national industry, and particularly in transportation, by policies or actions separate and independent of the interests of other employees in the industry. The more organized the industry, the more successful will be the union's representation of any single employee unit, and vice versa. A strike by employees of one employer can mean lockout of the employees of another. A victory in collective bargaining for employees of one carrier will likely mean a victory for the employees of another. Conversely, a bargaining defeat for the employees of one carrier can mean defeat for employees of many other carriers. Accordingly, a national union in this industry seeking responsibly to protect the employees it represents must devote its resources for organization, collective bargaining, and strikes on a national rather than a unit-by-unit basis. The most energy may have to be expended on the weakest link in the chain, for a strike lost in Maine can mean defeat for employees in Oregon; a bargaining proposal defeated in Georgia can mean its defeat in California.

10. Congress has been fully aware of, and has codified, the national-based bargaining scheme in the transportation sector. This is reflected in the initial enactment of the Railway Labor Act in 1926 and its major amendment in 1934, and in the 1963 legislation to resolve the railway labor crew consist impasse on a nationwide basis under Public Law 88-108 (45 U.S.C., following §157). The same national perspective is reflected in the more recent AMTRAK and CONRAIL legislation (Public Law 92-316, 86 Stat. 227; Public Law 93-236, 87 Stat. 985).

11. Accordingly, it is my opinion that the provisions of the Railway Labor Act, including its Section 2, Eleventh authorizing compulsory

dues, must be read consonantly with the principles of employee interdependence and national-union organization and bargaining, upon which the transportation unions must base their policy decisions, actions, and expenditures in the interests of their entire membership.

Willard Wirtz
WILLARD WIRTZ

Subscribed and sworn to before me this 30th day of December, 1975.

Notary Public

My Commission expires: July 1, 1978

(Proof of service omitted in printing.)

JA-231 ENTERED FILED

JAN 21 1973 JAN 21 1973

CLERK, U.S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

CLERK, U.S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA BY DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al.,

Plaintiffs,

v.

BROTHERHOOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Defendants.

Civil No. 73-113-N
Consolidated with
Civil No. 73-118-N

FINDINGS OF UNDISPUTED FACTS AND CONCLUSIONS OF LAW

ALLAN FAILS, et al.,

Plaintiffs,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Defendants.

This cause came on regularly for hearing and consideration before the Honorable Leland C. Nielsen on the motion of the plaintiffs, Howard Ellis, et al., Allan Fails, et al., individually and as class representatives, for summary judgment in the above entitled and consolidated cases, pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Court, having considered said motion and the opposition of defendants thereto, and having examined and considered the entire record in the matter, including the pleadings, depositions, affidavits, and memoranda filed in support of and in opposition to the said motion, the Court now finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiffs at the commencement of these actions were citizens of the United States, residing in the State of California and employed by Western Airlines at various locations in the State of California, including Los Angeles, San Francisco and San Diego.

2. Defendants Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees and its subsidiary organizations, System Board of Adjustment No. 451, Skyliner Lodge Local 3001, Sky Harbor Lodge Local 3014, and Arrowliner Lodge Local 3049, are unincorporated associations and labor organizations whose purpose, in part, is the representation of employees for collective bargaining over wages, hours and working conditions within the meaning of Section Two of the Railway Labor Act. Defendant California State Legislative Committee of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees is an unincorporated association, subsidiary to and affiliated with the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, which has as its purpose, in part, the sponsorship of legislation in the State of California. Defendants are hereinafter collectively referred to as "BRAC".

3. Defendants Local Lodges 3001, 3014 and 3049 are subsidiary to Defendant System Board No. 451, which is in turn subsidiary to the Grand Lodge of the Brotherhood of Railway, Airline and Steamship Clerks.

4. Western Airlines is a corporation authorized to and doing business in the State of California, engaged in the transportation of passengers and freight in interstate commerce.

5. At all times material, Western Airlines has maintained a collective bargaining relationship with BRAC governing the terms and conditions of employment of plaintiffs and Fails class members and BRAC has been, and is, the exclusive bargaining agent for the craft or class of employees in which they are employed.

6. Under the terms of the collective bargaining agreement in effect between Western Airlines and BRAC, effective October 1, 1969, and the Letters of Agreement of October 27, 1966 and February 26, 1971, made a part of and incorporated into the collective bargaining agreement, each

employee in a classification under the agreement was required to acquire and maintain membership in BRAC as a condition of employment after completion of the sixtieth day of employment, except that employees who were hired prior to October 27, 1966 and were not members as of that date were not required to acquire and maintain membership but only to tender to BRAC an agency fee equal to the initiation fee and monthly dues uniformly imposed on union members.

7. A communication issued by BRAC International President C. L. Dennis and published in the November, 1975 issue of the *Railway Clerk/ interchange* construed the BRAC Constitution as not requiring any employe represented by BRAC to become a formal union member as a condition for retaining his job rights or for qualifying for other generally available union benefits.

8. Plaintiffs Fails, Frost, Johnson, Erkman, Taylor, Brown, Nelson, Damante, Ryan, Grote, Ballard, Young, Douglas, Emminger and Wisor, hereinafter collectively referred to as the "Fails plaintiffs" are or have been members of defendant BRAC, employed by Western Airlines. On March 23, 1973, the Fails plaintiffs filed Case No. 73-118-N, for themselves and as class representatives.

9. The Fails plaintiffs' motion for determination of class action determination of all issues was granted in orders entered by this Court dated September 14, 1973 and April 8, 1975. The class includes all BRAC members employed or formerly employed by Western Airlines who submitted written objections as stated in paragraph 13 of the Fails complaint. Subsequent references to the "Fails plaintiffs" include the class members.

10. Plaintiffs Ellis, Balian, Sauls, Dean, Payne, Fontaine, and Loudin, hereinafter collectively referred to as the "Ellis plaintiffs," are or have been employees of Western Airlines who have declined to become members of defendant BRAC, but who have been obligated, as a condition of their employment, to tender agency fees to defendant BRAC equivalent to the membership dues and fees paid by members of defendant BRAC. On March 20, 1973, the Ellis plaintiffs filed Case No. 73-113-N.

11. Subsequent references to "the plaintiffs" include the Ellis plaintiffs, the Fails plaintiffs, and the Fails class members.

12. Except for the class allegations in Case No. 73-118-N, the allegations of the two complaints are essentially the same. The plaintiffs alleged that defendant BRAC expended compulsory dues and fees exacted from plaintiffs, over their written objections, for political and various other non-collective bargaining purposes. Plaintiffs alleged that these expenditures over their objections deprived them of their rights under the Railway Labor Act and the First, Fifth and Ninth Amendments to the United States Constitution, and constituted a breach by defendant BRAC of its duty of fair representation owed to plaintiffs. Plaintiffs further alleged that defendant BRAC's existing three and one-third cents dues reduction procedure was unavailable to plaintiffs and further that the procedure was arbitrary and discriminatory because it did not correlate with defendants' political and ideological expenditures. Plaintiffs sought declaratory and injunctive relief, money damages, attorneys' fees, and costs.

13. Plaintiffs and those class members falling within the territorial jurisdiction of the Defendant Local Lodges 3001, 3014 and 3049 pay dues and fees to the appropriate Local Lodge, to System Board No. 451, and to the Grand Lodge. Each Local Lodge remits 30 cents per person per month to the California State Legislative Committee. The remaining class members pay dues and fees to Local Lodges in their area, to System Board No. 451, and to the Grand Lodge. Thirty cents per month from their dues and fees is similarly sent to a State Legislative Committee.

14. Each plaintiff and class member has sent a written protest to BRAC, objecting to the contractual requirement compelling the payment of wages as union dues and fees. The language of each such protest is as follows:

> As an employee of Western Airlines, I feel that the Brotherhood of Railway, Airline and Steamship Clerks does not properly represent my interests and I protest the compulsory "agency fee" I must pay the Brotherhood of Railway, Airline and Steamship Clerks, in order to retain my job. In addition, I hereby protest the use of these fees for any purpose other than the cost of collective gargaining [*sic*] and specifically protest the support of Legislative goals, candidates for political office, political efforts of any kind or nature, ideological causes, and any other activity which is not a direct cost of collective gargaining [*sic*] on my behalf. I demand an accounting and refund from the Brotherhood of Railway,

Airline and Steamship Clerks of all fees exacted from me by the so-called "agency fee".

15. Each such protest was sent by certified mail. In some instances, delivery was refused; in others, the letters were discarded; in still others, the letters were received but not opened. Defendants did not respond to any of these protest letters.

16. When the protest letters were sent by plaintiffs, the BRAC Constitution contained the following refund device:

> Any member who does not desire to contribute to the Legislative Fund Account may have his dues reduced three and one-third (3-1/3) cents per month, by notifying his Financial Secretary in writing and paying his dues direct to said Financial Secretary. Reduction in dues become effective with the month following the month in which the member notifies the Financial Secretary in writing and cannot be retroactive. The Financial Secretary will acknowledge receipt of notice.

17. None of the plaintiffs' dues were reduced or refunded in the amount set forth in the BRAC Constitution. Plaintiff Ellis specifically requested the 3-1/3 cents per month reduction, but was told that nonmembers could not participate in the reduction scheme.

18. Approximately nine months after these suits were commenced, BRAC promulgated a Policy Statement (dated January 24, 1974) which established a procedure whereby objecting members and agency fee payers could secure a refund of that portion of their dues and fees which was expended upon "political purposes not germane to collective bargaining." Plaintiffs thereupon sought and obtained leave to amend their complaints.

19. The amendments allege that provisions of the Policy Statement are inconsistent with those of the BRAC Constitution, and that the Policy Statement is consequently invalid, as it was not adopted as a constitutional amendment. It is charged that the Policy Statement is part of a continuing bad faith effort by BRAC to deprive plaintiffs of constitutional and statutory rights. In addition to the relief requested in the complaints, plaintiffs pray:

(1) for an order determining that the adoption of the Policy Statement is void;
(2) for an order restraining defendants from subjecting persons represented by BRAC to the Policy Statement;
(3) for an order releasing objectors from any obligation to pay dues, fees, or assessments to defendants or any subordinate or affiliated organizations as a condition of employment;
(4) for damages, attorneys' fees, costs, and such other relief as the Court may deem proper.

20. Defendants raise the following affirmative defenses to the complaints, as amended:

(1) failure to state a claim upon which relief may be granted;
(2) failure to exhaust internal and administrative remedies;
(3) the bar of various statutes of limitations;
(4) preemption by the System Board of Adjustment, with regard to those claims arising out of the interpretation or application of the collective bargaining agreement.

21. Case No. 73-113-N and Case No. 73-118-N, pursuant to the stipulation of the parties and the order of this Court, have been consolidated for purposes of discovery and trial.

22. BRAC has engaged in the following activities since June 30, 1972:

(1) Recreational, social and entertainment expenses for activities not attended by management personnel of Western Airlines.
(2) Operation of a death benefit program.
(3) Organizing and recruiting new members for BRAC among Western Airlines bargaining unit employees.
(4) Organizing and recruiting new members for BRAC, and/or seeking collective bargaining authority or recognition for:
  (a) employees not employed by Western Airlines;
  (b) employees not employed in the air transportation industry;
  (c) employees not employed in other transportation industries.
(5) Publications in which substantial coverage is devoted to general news, recreational and social activities, political and legislative matters, and cartoons.
(6) Contributions to charities and individuals.

(7) Programs to provide insurance, and medical and legal services to the BRAC membership, or portions thereof, other than such programs secured for its salaried officers and employees.
(8) Conducting and attending conventions of BRAC.
(9) Conducting and attending conventions of other organizations and/or labor unions.
(10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements or settlement or adjustment of grievances or disputes of employees represented by BRAC.
(11) Support for or opposition to proposed, pending, or existing legislative measures.
(12) Support for or opposition to proposed, pending, or existing governmental executive orders, policies, or decisions.

23. Funds for the activities listed in paragraph 23 are derived in part from the dues and fees plaintiffs are compelled to pay BRAC.

24. A portion of plaintiffs' payments to the Grand Lodge are placed in general fund accounts. The defendants have been affiliated with various non-BRAC organizations at times material hereto, and have contributed amounts from general funds to said organizations. Included among those organizations are:

> the AFL-CIO, the Canadian Labour Congress, the Congress of Railway Unions, the Council of AFL-CIO Unions for Professional Employees, the Union Label and Service Trade Department of the AFL-CIO, and Canadian Railway Office of Arbitration, the Canadian Railway Labour Association, the Cooperating Railway Labor Organizations, the Canadian Non-Operating Railway Unions, and the San Diego-Imperial Counties Labor Council.

The foregoing non-BRAC organizations engage in fraternal, social, and political activities; and they espouse positions on economic and ideological issues, through publications and other means.

25. The Railway Clerks Political League (RCPL) is an unincorporated association affiliated with BRAC. Its officers are all BRAC officers, and its activities are conducted by officers and employees of BRAC, whose compensation is paid entirely by BRAC. Office space, computer services, and other operating supplies and facilities are provided by BRAC at no charge. The funds for such undertakings are derived

from the BRAC General Fund, into which a portion of plaintiffs' dues and fees is commingled.

26. The RCPL supports or opposes political candidates, causes and legislation.

27. Funds for the RCPL are solicited by paid officers and employees of the Grand Lodge of BRAC and its subordinate and affiliated organizations, including the remaining defendant. These fund-raising activities include publications in the BRAC magazine, *Railway Clerk/ interchange*. and personal appeals at System Board and local lodge meetings. The direct and indirect costs of such fund-raising activities are paid by BRAC from general funds, and RCPL makes no reimbursement therefor.

28. Some amounts collected for RCPL are transmitted through the General Fund accounts of the Defendant Local Lodges, System Board #451, and Grand Lodge. RCPL funds have been utilized for the payment of employee salaries and other BRAC Grand Lodge operating expenses since prior to January 1, 1972.

29. BRAC has incurred costs for political activities from its General Fund for at least five to ten years.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties hereto, and over the subject matter hereof, under 28 U.S.C. § 1337.

2. Fails et al. v. BRAC, Case No. 73-118-N, is properly brought as a class action.

3. BRAC owes each plaintiff the fiduciary duty of fair representation.

4. Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152 *et seq.*, as construed by the United States Supreme Court in *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784 (1961), is intended to force all employes covered by the Act to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes.

5. The Railway Labor Act prohibits the use of fees and dues for non-collective bargaining purposes and activites, over protest from a represented employe.

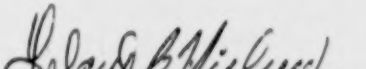
6. Those activities listed in Paragraph 22 of the Findings of Fact are non-collective bargaining activities as that term is defined in *Street, supra*.

7. BRAC's use of dues and fees of protesting employes for non-collective bargaining activities and purposes constitutes a breach of the fiduciary duty of fair representation BRAC owes to each plaintiff.

8. BRAC has further breached its duty of fair representation to plaintiffs by the following:

(1) refusing delivery of some of plaintiffs' protest letters, discarding some letters, and ignoring the balance of such letters;
(2) failing to make dues reductions of 3-1/3 cents per month to Fails plaintiffs and class members, as provided in the BRAC Constitution;
(3) excluding agency payers such as plaintiff Ellis form eligibility for the 3-1/3 cents dues reduction becaue of their non-membership;
(4) maintaining provisions in its constitutions (1967 and 1971) which were not good faith efforts to comply with its lawful obligations.

Dated: January 20, 1976



LELAND C. NIELSEN,
United States District Judge

Copies to:

Michael E. Merrill, Esq.
The National Right to Work Legal
Defense Foundation, Inc.
8316 Arlington Blvd., Suite 600
Fairfax, Virginia 22030

Jonathan C. Gibson, Esq.
Gibson & Kennerson
1212 Home Tower
707 Broadway
San Diego, CA 92101

John L. Kilcullen, Esq.
Webster, Kilcullen & Chamberlain
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Joseph L. Rauh, Jr., Esq.
Rauh, Silard and Lichtman
1001 Connecticut Ave., N.W.
Washington, D.C. 20036

Joel N. Klevens, Esq.
5900 Wilshire Blvd., Suite 2600
Los Angeles, CA 90036

Solomon I. Hirsh, Esq.
6300 River Road
Rosemont, Illinois 60018

James L. Highsaw, Esq.
Highsaw and Mahoney
1015 - 18th Street, N.W.
Suite 506
Washington, D.C. 20036

I hereby attest and certify on 1-22-26
that the foregoing document is a full, true and correct
copy of the original on file in my office and in my
legal custody.

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
By _____ Deputy

JOSEPH L. RAUH, JR.
JOHN SILARD
HARRIET R. TAYLOR
RAUH, SILARD and LICHTMAN
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-1795

BODLE, FOGEL, JULBER, REINHARDT and ROTHSCHILD
GEORGE E. BODLE
STEPHEN REINHARDT
LESTER G. OSTROV
JOEL N. KLEVENS
5900 Wilshire Boulevard, Suite 2600
Los Angeles, California 90036
(213) 937-6250

SOLOMON I. HIRSH
WILLIAM J. DONLON
6300 River Road
Rosemont, Illinois 60018
(312) 692-7711

JAMES L. HIGHSAW
HIGHSAW and MAHONEY
1015 18th Street, N.W., Suite 506
Washington, D.C. 20036
(202) 833-2020

Attorneys for Defendants

FILED

APR 14 1976

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY [illegible] DEPUTY

ENTERED

APR 14 1976

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY [illegible] DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al., Defendants.	CIVIL NO. 73-113-N Consolidated with CIVIL NO. 73-118-N AMENDED ORDER GRANTING INTERLOCUTORY SUMMARY JUDGMENT

ALLEN FAILS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

In accordance with the Findings of Fact and Conclusions of Law in this matter and with Rule 56(c) of the Federal Rules of Civil Procedure, and the Court having determined that there are no genuine issues of material fact as to the issue of liability alone,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That an interlocutory summary judgment be entered for the plaintiffs and Fails class members (hereinafter collectively referred to as "plaintiffs") as to the issue of liability alone, the Court having found defendants to have breached their duty of fair representation as more fully set forth in the Findings of Fact and Conclusions of Law;

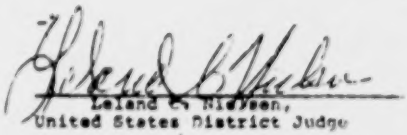
2. That summary judgment be denied as to each and every issue of damages, all such issues to be determined according to evidence to be presented at the trial phase of this litigation; and

3. That the Order herein involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from this Order may materially advance the ultimate determination of this litigation. Therefore, this Court certifies the following question to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. section 1292(b): Whether the Railway Labor Act and the duty of fair representation prohibit the expenditure of dues and fees over protest of represented employees for any purposes other than political purposes; and, if so, whether the Railway Labor Act and the duty of fair representation prohibit the use of dues and fees over protest from represented employees for non-collective bargaining purposes and activities; and, if so, whether expenditures of dues and fees over protest of represented employees for the purposes and activities listed in paragraph 22 of the

Findings of Fact filed herein on January 21, 1976 are expenditures for non-collective bargaining activities as to which protestors are entitled to dues rebates and/or reductions.

SO ORDERED.

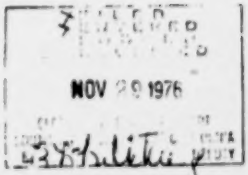
Dated: 4-13-76.



Leland C. Nielsen,
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA



HOWARD ELLIS, et al.,

Plaintiffs,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Defendants.

CIVIL NO. 73-113-N
Consolidated with
CIVIL NO. 73-118-N

ORDER AMENDING INTERLOCUTORY SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION TO RELIEVE DEFENDANTS OF THE REQUIREMENT OF FURTHER ANSWER TO INTERROGATORY NUMBER FIVE

ALLEN FAILS, et al.,

Plaintiffs,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Defendants.

The Court entered an interlocutory summary judgment for plaintiffs dated January 21, 1976. In conjunction with that summary judgment, the Court stated among its findings of fact that:

> 22. BRAC has engaged in the following activities since June 30, 1972:
>
> * * *
>
> (10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements or settlement or adjustment of grievances or disputes of employees represented by BRAC."

Subsequent to the rendition of the summary judgment, plaintiffs propounded a fifth series of interrogatories, of which Interrogatory No. 5 sought to ascertain the expenditures of all organizations affiliated with

BRAC for activities listed in Paragraph 22 of the Court's findings of fact. Defendants prepared and served a partial response, and on November 4, 1976, filed a motion to obtain relief from submitting further answers to that interrogatory.

Upon consideration of defendants' motion, the response filed by plaintiffs, the presentation of oral argument and related research, the Court deems it appropriate:

(a) to clarify its earlier ruling so as to delimit the scope of costs chargeable against plaintiffs to those of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes incurred by the defendants in the representation of plaintiffs with Western Airlines; and

(b) to relieve defendants of the requirement of further answer to Interrogatory Number 5.

IT IS THEREFORE ORDERED AND ADJUDGED that Paragraph 22 (10) of the Court's findings of fact issued in conjunction with the summary judgment dated January 21, 1976, be withdrawn, and the findings of fact, conclusions of law, and interlocutory summary judgment are hereby amended by substitution of the following finding of fact:

> "22. BRAC has engaged in the following activities since June 30, 1972:
>
> * * *
>
> (10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements with Western Airlines, or settlement or adjustment of grievances or disputes of employees of Western Airlines."

AND IT IS FURTHER ORDERED AND ADJUDGED that defendants are relieved of the requirement of further answer to Interrogatory Number 5 in plaintiffs' fifth series of interrogatories.

DONE AND ORDERED THIS 29 day of November, 1976.

LELAND C. NIELSEN, JUDGE

JOSEPH L. RAUH, JR.
JOHN SILARD
MARY M. LEVY
RAUH, SILARD and LICHTMAN
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-1795

GEORGE E. BODLE
STEPHEN REINHARDT
LESTER G. OSTROV
JOEL N. KLEVENS
BODLE, FOGEL, JULBER, REINHARDT and ROTHSCHILD
5900 Wilshire Boulevard, Suite 2600
Los Angeles, California 90036
(213) 937-6250

SOLOMON I. HIRSH
WILLIAM J. DONLON
6300 River Road
Rosemont, Illinois 60013
(312) 692-7711

JAMES L. HIGHSAW
HIGHSAW, MAHONEY and FRIEDMAN
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Attorneys for Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al., Defendants.	CIVIL NO. 73-113-N Consolidated with CIVIL NO. 73-118-N AFFIDAVIT OF WILLIAM L. SCHERI

ALLEN FAILS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

WILLIAM L. SCHERI, being duly deposed and sworn states as follows:

1. I am the Assistant Airline Coordinator of the International Association of Machinists and Aerospace Workers. For some 20 years I have been employed in capacities related to the Airline Division of the Machinists Union. Our union represents some eighty thousand airline employees on 140 carriers and service companies. While we have achieved wide organization of ground service employees among airline clerks neither we nor other unions have achieved their organization on the largest carriers, and there are also many unorganized subcontractors performing work in various categories.

2. In connection with a pending litigation I have been asked to describe the effect upon employment security and working benefits of organized employees in the industry from the substantial number of unorganized carriers and subcontractors. It is my opinion from many years of experience and many individual bargaining situations that the employment security and working benefits of the organized employees in the industry are jeopardized and diminished by the substantial numbers of unorganized carriers and subcontractors, so that extension of organization strongly reinforces the employment and working benefits of those already organized. Our experience falls into three separate areas: (A) preserving employment for organized workers; (B) negotiating benefits for organized employees; and (C) winning strikes for improved working rights.

A. Preserving Employment for Organized Workers

It has been our bitter experience time and again that the existence of unorganized carriers threatens and impairs the employment security and work benefits of the organized. One recent example involves the loss of

the contract held by TWA at the Kennedy Space Center in Florida, where we had a collective-bargaining agreement. The existence of substantial unorganized and lower paid work forces in the Florida area put TWA at a disadvantage in bidding for continuation of the contract at the Space Center, and when TWA lost the contract in 1971 many of our people had to move away to other employment.

We had a similar experience with Lockheed Air Terminal, a fueling company at New Orleans, when in 1973 it was underbid on its contract by General Aviation, another fueling company which was unorganized and could offer lower rates.

We had a similar experience at Kansas City in March of 1977 where TWA was performing flight kitchen catering for United Airlines using our employees. When TWA asked for a cost increase based on the negotiated pay increases for our workers, United Airlines shifted to an independent unorganized contractor (Marriott).

Another example of the loss of work for the organized employee is Ransome Airlines at Philadelphia. It has moved unorganized maintenance employees into that station to accomplish the fueling operation formerly performed by our organized employees of Allied Aviation and Atlantic Aviation. Industrial Relations officers of Allied have even urged us to organize the other operators, because Allied is being underbid and losing contracts and thus we are losing members and employees.

A similar situation exists on foreign flag carriers. Marriott is unorganized and can underbid any organized kitchen. Between 1972 and 1975 we lost the flight kitchen operations on KLM, Air France, Lufthansa and Swiss Air. For similar reasons, among foreign flag carriers we have lost a large group of members working in airline cargo facilities performing loading operations which were once done by airline employees under negotiated agreements. There is a similar situation with respect to stock clerks who used to do the warehousing, shipping, receiving and storing which is now subcontracted to non-union vendors.

For similar reasons, maintenance work on aircraft at Eastern Airlines is being farmed out to local non-union operators all over the country. Eastern Airlines has frequently cited the lower costs of non-union contractors for farming out mechanical, stock clerk and fueling work.

Even where we have not actually lost members and employment due to the pressure of the unorganized employer, we are still constantly threatened with that possibility and must exert valuable bargaining chips to keep carriers from farming out work of our employees to non-union contractors. Northwest Airlines has threatened to close their flight kitchens and rely on Marriott or some other unorganized producer; in 1977 negotiations over the Anchorage flight kitchen, Northwest announced its plan to open three additional stations but emphasized that if our wage demands were met they would be priced out and would cancel the expansion. The Flying Tiger Line has threatened to farm out the plant security work to unorganized and lower-cost operators such as Burns or Wackenhut. Our flight kitchen operation is constantly threatened by unorganized companies such as Dobb's House and Sky Chef bidding at lower cost than Continental, which we have organized. The same is our experience with TWA on automotive equipment, truck repair, engine overhaul, accessory units, etc. We are constantly either trying to retain this work, by browbeating the Company or in grievance procedures, while the Company claims it can do the work cheaper with outside unorganized jobbers.

The above are some of the situations where we have lost work for our organized people or are threatened with loss of work and must use some of our bargaining chips to hold on to work because of the existence of unorganized lower rate competitors and contractors.

B. **Negotiating Benefits for Organized Employees**

An equally severe problem is the bad effect upon our ability to obtain benefits for our organized workers while there remain so many unorganized carriers and contractors. The airlines have become very competitive in recent years and are in a tight money situation. We constantly meet the assertion by organized carriers that they cannot meet our wage and benefit demands because of unorganized competition. For instance, TWA frequently points to Delta, an unorganized competitor. In the 1976 negotiations with Altair Airlines it pointed to competition from Atlantic Aviation in Wilmington, which is unorganized and pays lower wages.

We have several contracts with small support companies doing baggage-handling, fueling and maintenance for various airlines. The companies we represent assert at the bargaining table that our demands would increase their costs to the point of making them non-competitive

with the unorganized companies. Indeed, on at least two occasions these companies have urged us to organize their competitors (Ground Service International and Monarch Air Services) to assure continued employment for our members. Similarly, company negotiators in recent bargaining efforts with Ozark Airlines, Butler Aviation and Allied (O'Hare), resisted increases in prolonged negotiations on the grounds that their competitors pay less to unorganized workers.

Another recent example involves Allegheny Airlines. Under the Allegheny commuter agreement (the M-298 program) in 1975 we had to agree to a special set of work rules on this division with lower wages and fringe benefits for our members because the company repeatedly urged its need to remain cost-competitive with unorganized commuter lines, pointing particularly to Ransome Airlines as a reason for holding down our members' wage and benefit demands. The clear result is that workers we represent are earning less because other carriers are unorganized.

The same problem exists on Air Wisconsin, where we represent mechanics and related workers as well as the clericals. The Company consistently argues against our contract demands on the ground that with comparable air fares their unorganized competitors with lower labor costs have an unfair advantage. The same point is made by Page Airways whose chief negotiator Luss has been adamant that our demands would put the Company out of operation due to competition with unorganized Northern Airmotive at Minneapolis.

There are many similar examples showing how we are limited in our bargaining power for our organized workers while there are unorganized competitors, and that we could do far more for our people if more workers in the industry could be organized. Currently we are petitioning for representation on Marriott, one of the worst offenders. We are slowly making headway, but organizing is difficult and expensive and there are a great many separate employers to be dealt with at separate locations.

C. Winning Strikes for Improved Working Rights

Another serious problem in winning benefits for our workers relates to the difficulty of winning strikes for improved benefits while competing carriers remain unorganized. This is a result of a special agreement in the airline industry known as the Mutual Aid Pact. That pact has been the subject of much public discussion and Congressional attention because

of its inhibiting effect upon the use of the strike to win working rights for airline employees.

Here is why unions are hurt under the MAP arrangement by unorganized carriers. MAP gives a struck carrier compensation, from a fund created jointly by the carriers, to the extent that it loses business to other carriers during the strike. In other words, if a union strikes a carrier who thus loses customers to unorganized carriers whom the union cannot strike, then to that extent MAP repays the loss of revenue to the struck carrier.

When we can organize the MAP carriers the situation is quite different. We can then strike competitors in MAP simultaneously, preventing their shift of traffic from one carrier to another and thus the return of funds to that carrier by the others which permits it to hold out indefinitely against a strike. That is what we did in 1966 when for ground service employees and mechanics we struck five carriers simultaneously. In other words, we greatly improve the bargaining power of our employees when we can organize similar employees of the carriers in MAP. That directly benefits the employees already organized, by preserving their strike weapon for improved working benefits.

3. Based on the above, it is my expert opinion that organizing more of the unorganized employees in the airline industry, and particularly in the underorganized clerks category, substantially benefits those who are already organized. *First,* it protects them from loss of employment due to loss of contracts or to subcontracting, as indicated above in 2A. *Second,* it enhances their bargaining power by removing the competitive advantage of the unorganized carrier or contractor, which necessarily limits the wage and benefits options of organized carrieres, as indicated above in 2B. *Third,* it makes the strike a more viable weapon for winning improved working rights, because it limits the operation of MAP which prolongs strikes and makes them difficult to win, as indicated above in 2C.

It is my overall opinion that the airlines industry is peculiarly one in which there is a nationwide interdependence of employees, and that nothing more assists those already organized than the achievement of further organizing success.

William L. Scheri
WILLIAM L. SCHERI

Subscribed and sworn to before me
this 17th day of November,
1977.

Parker D. Joyce
Notary Public, D. C.

My Commission expires: 11-30-78

(Proof of service omitted in printing.)

JOSEPH L. RAUH, JR.
JOHN SILARD
MARY M. LEVY
RAUH, SILARD and LICHTMAN
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-1795

GEORGE E. BODLE
STEPHEN REINHARDT
LESTER G. OSTROV
JOEL N. KLEVENS
BODLE, FOGEL, JULBER, REINHARDT and ROTHSCHILD
5900 Wilshire Boulevard, Suite 2600
Los Angeles, California 90036
(212) 937-6250

SOLOMON I. HIRSH
WILLIAM J. DONLON
6300 River Road
Rosemont, Illinois 60013
(312) 692-7711

JAMES L. HIGHSAW
HIGHSAW, MAHONEY and FRIEDMAN
1050 17th Street, N.W.
Suite 210
Washington, D.C. 20036
(202) 296-8500

Attorneys for Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

CIVIL NO. 73-113-N
Consolidated with
CIVIL NO. 73-118-N

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF FINAL ORDER

ALLEN FAILS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

* * * *

[2] Plaintiffs again substitute rhetoric for fact and argument when they refer to a "series of transactions in which BRAC 'laundered' $100,000 so as to convent it into 'hard money' for political contributions" (p. 10). But this *trade* of *excess* voluntary political contributions to another union for regular dues money is long-standing and wholly unchallenged labor union practice. Actually plaintiffs *benefited* from BRAC trading voluntary political contributions (to which plaintiffs did not contribute) for regular dues money, thus increasing the dues funds to which they do contribute.

(Proof of service omitted in printing.)

JOSEPH L. RAUH, JR.
JOHN SILARD
MARY M. LEVY
RAUH, SILARD and LICHTMAN
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-1795

GEORGE E. BODLE
STEPHEN REINHARDT
LESTER G. OSTROV
JOEL N. KLEVENS
BODLE, FOGEL, JULBER, REINHARDT and ROTHSCHILD
5900 Wilshire Boulevard, Suite 2600
Los Angeles, California 90036
(213) 937-6250

SOLOMON I. HIRSH
WILLIAM J. DONLON
6300 River Road
Rosemont, Illinois 60013
(312) 692-7711

JAMES L. HIGHSAW
HIGHSAW, MAHONEY and FRIEDMAN
1050 17th Street, N.W.
Suite 210
Washington, D.C. 20036
(202) 296-8500

Attorneys for Defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al., Defendants.	CIVIL NO. 73-113-N Consolidated with CIVIL NO. 73-118-N PRE-TRIAL ORDER

ALLEN FAILS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

Pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, IT IS ORDERED:

I

This is an action: For the recovery of monies paid as union dues and fees by plaintiffs to defendants; for an adjudication as to the payment of future amounts for such purposes; and for adjudication of various union actions relating to the collection and use of dues and fees, the implementation and operation of defendants' dues rebate procedures, and the exclusion of certain persons from union activities, all of which are alleged to violate the union's statutory duty of fair representation. Plaintiffs further claim that the collection and use of their dues and fees for purposes other than collective bargaining between defendants and Western Airlines violates their rights secured by the First, Fifth and Ninth Amendments to the United States Constitution.

As used herein, "plaintiffs" denotes the named plaintiffs in both of these consolidated actions, and the *Fails* class members. As used herein, "BRAC" includes the following defendants: The Grand Lodge of the Brotherhood of Railway, Airline and Steamship Clerks, System Board of Adjustment No. 451, Local Lodges 3001, 3014 and 3049, and the California State Legislative Committee (which went out of existence on July 1, 1977).

The pleadings giving rise to the issues herein are the complaints filed in the *Ellis* and *Fails* cases, amendments to those complaints, and the answers and amended answers to same. This Court has already granted to plaintiffs an interlocutory summary judgment as to the issue of liability, leaving for resolution at trial the issue of damages and relief for the future (Order of January 21, 1976, as amended April 14, 1976 and November 29, 1976).

II

Federal jurisdiction and venue are invoked upon the ground: That rights secured plaintiffs by the United States Constitution have been abridged unlawfully by defendants. In addition, jurisdiction is premised upon 28 U.S.C. § 1337, as the statutory rights and obligations adjudicated herein arise under a statute (the Railway Labor Act, 45 U.S.C. § 151, et seq.) regulating interstate commerce. Venue is premised upon the fact that certain of the plaintiffs and defendants are residents of, and doing business within, the Southern District of California.

III

The following facts are admitted and require no proof:

1. Since prior to 1971, BRAC has held a certification issued by the National Mediation Board, a federal governmental agency, as the exclusive representative of "the craft or class of Clerical, Office, Fleet and Passenger Service Employees, employees of Western Airlines, Inc." As of December 31, 1977 BRAC and its subordinate bodies comprised a total membership of 202,582 (143,154 active), of whom 19,915 (17,151 active) are in Canada. Of the total union membership, the air transportation industry accounts for approximately 5% and the railroad industry accounts for approximately 85%.

2. Plaintiffs and defendants agree that formal union membership cannot lawfully be required of employees, and pursuant to defendants' statement of this position during the course of this litigation, certain of the *Fails* plaintiffs and class members have resigned formal union membership, assuming the status of agency fee payers.

3. Plaintiffs have each paid dues to BRAC in these amounts:

$11.00 per month until June 1, 1975, of which $4.20 went to the Grand Lodge, $4.20 to System Board 451, and $2.60 to the Local Lodge (of which 30¢ per member per month was sent by the Local to the California State Legislative Committee).

$15.00 per month until July 1, 1977, of which $5.20 per month went to the Grand Lodge, $6.20 to System Board 451, and $3.60 per month to the Local Lodge (of which 30¢ per member per month was sent by the Local to the California State Legislative Committee).

$17.00 per month since July 1, 1977, of which $6.10 per month goes to the Grand Lodge, $6.90 to System Board 451, and $4.00 to the Local Lodge (of which 30¢ per member per month is sent to the Grand Lodge, earmarked for regional political action committees).

BRAC dues in Canada follow:

$7.50 per month from January 1, 1972 until July 1, 1975, of which $3.35 per month went to the Grand Lodge, $2.60 to the System Board, and $1.55 to the Local Lodge.

$11.00 per month from July 1, 1975 to June 1, 1976, of which $4.20 per month went to the Grand Lodge, $4.20 to the System Board, and $2.60 to the Local Lodge.

$11.50 per month since June 1, 1976, of which $4.20 per month went to the Grand Lodge, $4.20 to the System Board, $2.60 to the Local Lodge and 50¢ to the Canadian division.

4. Plaintiffs and defendants agree upon the following procedure for stipulating the amounts which plaintiffs have paid to the defendants as dues and fees since July 1, 1972: Plaintiffs will submit to defendants within 30 days of the date of this order a list of the full names and addresses of all persons they assert to be plaintiffs at the present time and the date each such plaintiff sent a written protest to BRAC objecting to the contractual requirement compelling payment of union dues and fees. Defendants will submit to plaintiffs within 30 days thereafter the amounts of dues and fees paid by each plaintiff from the date of protest through 1977 and the amount of rebate each plaintiff has received in that period.

5. There is set forth below the number of WAL active members and agency fee payers and the number of non-WAL active members and fee payers as of December 31 of the relevant years:

	WAL employees	Non-WAL employees
1972		
System Board 451	3,752	11
Local Lodge 3001	543	0
Local Lodge 3014	187	0
Local Lodge 3049	1,526	0

1973		
System Board 451	3,841	70
Local Lodge 3001	522	70
Local Lodge 3014	216	0
Local Lodge 3049	1,560	0
1974		
System Board 451	3,677	42
Local Lodge 3001	527	12
Local Lodge 3014	208	0
Local Lodge 3049	1,534	0
1975		
System Board 451	3,622	83
Local Lodge 3001	443	11
Local Lodge 3014	200	24
Local Lodge 3049	1,466	0
1976		
System Board 451	3,730	91
Local Lodge 3001	448	11
Local Lodge 3014	211	21
Local Lodge 3049	1,319	0
1977		
System Board 451	3,886	80
Local Lodge 3001	472	6
Local Lodge 3014	210	25
Local Lodge 3049	1,383	0

From July 1, 1971 until July 1, 1977 non-WAL employees represented by System Board 451 paid $11.00 dues per month, of which $4.20 went to the Grand Lodge, $4.20 to the System Board and $2.60 to the Local Lodge.

From July 1, 1977 to December 31, 1977, Las Vegas Baggage Handlers (Local 3039) and Ward's Skycaps (Local 3001) paid dues in the amount of $13.00 of which $5.45 went to the Grand Lodge, $4.95 to the System Board, and $2.60 to the Local Lodge. Allied Skycaps in Local 3039 and Local 3014 also paid $13.00 in dues, but the System Board's share in the amount of $4.95 went to the Allied Service Division. Allied Claim Attendants (Local 3039) paid dues in the amount of $10.00, of which $4.20 went to the Grand Lodge, $3.80 to the System Board and $2.00 to the Local Lodge.

BRAC received the above dues from, and incurred expenses in representing, said non-WAL employees.

The non-WAL employees referred to above have thus paid a dues rate lower than that charged Western Airlines employees. In addition to the non-WAL employees listed above, defendants have provided representation and incurred expenses in providing such representation to a small number of persons employed by employers other than Western Airlines, but no fees or dues have been charged such persons for said representation. This has generally occurred in states with Right-to-Work laws or prior to the negotiation and signing of the first collective bargaining agreement in accordance with the practice of BRAC and other unions.

6. On January 24, 1974, BRAC adopted a political dues rebate plan. On November 11, 1974 this Court ruled that said rebate plan contained an erroneous standard as a matter of law. In May, 1975, the operative provisions of the January 24, 1974 plan were incorporated in BRAC's Constitution. On October 6, 1975, defendants established a new political-ideological rebate procedure available to any BRAC dues or fee payer who objects to political or ideological use of his payments. Pursuant to said rebate procedure, defendants' Board of Trustees determined that 4.68% of BRAC monthly dues during 1975 was for political-ideological causes, and that 4.9% was expended for such causes during 1976. Each plaintiff in this case has been sent rebate checks by defendants based on the 1976 percentage of political-ideological expenditures (4.9%) from July 1, 1972 or date of employment, whichever was later, through 1976. The 1977 percentage of political-ideological expenditures has not yet been computed.

Leaving out the plaintiffs in this case, the total number of employees represented by BRAC requesting rebates under the October 6, 1975 rebate procedure was 201 in 1976 and 153 in 1977. No one has ever sought review by the Public Review Board of the amount set for political rebates.

IV

The reservations as to the facts recited in Paragraph III above are as follows:

1. Defendants reserve the right to object to the introduction of evidence concerning the January 24, 1974 dues rebate plan referred to in III, 6 above. Defendants contend that such evidence would be irrelevant because that plan was superseded by the October 6, 1975 political-ideological rebate system, which system satisfies the Supreme Court decisions in *Street* and *Allen* and was implemented retroactive to July 1, 1972 or date of employment, whichever was later.

2. Plaintiffs reserve the right to object to the introduction of evidence concerning the total number of employees represented by BRAC requesting rebates under the October 6, 1975 rebate procedure on the ground that the number of such persons is irrelevant to the validity of the procedure.

The following facts and conclusions, though not admitted, are not to be contested at the trial, as follows:

The Findings of Fact and Conclusions of Law set forth in this Court's interlocutory summary judgment dated January 21, 1976 are conclusive for purposes of the trial and shall not be subject to challenge or supplementation by evidence or legal argument at the trial. The findings of fact set forth in the interlocutory summary judgment dated January 21, 1976 continue to describe accurately the status and activities of the parties hereto, with the exception that certain of the *Fails* plaintiffs and class members have resigned formal union membership, as noted in III, 2 above. Further, subsequent to the entry of the interlocutory summary judgment dated January 21, 1976, BRAC has reaffiliated with the Railway Labor Executives Association, with attendant costs, which are rebatable under the October 6, 1975 political rebate procedure.

VI

Defendants assert that the following issues of fact, and no others, remain to be litigated upon trial:

> Defendants have stipulated that the final judgment in this case may direct a refund to the plaintiffs of the full amount of their Grand Lodge dues (less rebates already made for Grand Lodge political and ideological expenditure) from the date of their formal protest to BRAC to January 1, 1976, such refunds to be payable when and if the Court's ruling on liability is sustained upon appeal. Based on this stipulation and on the

interlocutory summary judgment of January 21, 1976, as amended, the following are the issues of fact to be litigated upon the trial:

1. The amount of BRAC expenditures for political ideological causes and the validity under *Street* and *Allen* of the political-ideological rebate system of October 6, 1975 as adopted and implemented.

2. The amount of the Grand Lodge expenditures other than on collective bargaining with Western Airlines during 1976 and 1977, and the appropriate method for determining such expenditures for the future.

3. The amount of the System Board and defendant Local Lodges expenditures other than on collective bargaining with Western Airlines from the date of plaintiffs' formal protest to BRAC to December 31, 1977, and the appropriate method for determining such expenditures for the future.

Plaintiffs assert that the following issues of fact, and no others, remain to be litigated upon trial:

1. Whether an accurate determination of the costs of collective bargaining between BRAC and Western Airlines can be made. If so, what is the measure of damages to which plaintiffs are entitled? It is plaintiffs' contention that the Court has ruled that BRAC cannot lawfully charge them with the costs of activities other than collective bargaining with Western Airlines for the plaintiffs' bargaining unit. Those costs which plaintiffs contend are non-chargeable include: (a) those activities described in paragraphs 22, 24, 25, 27 and 29 of the interlocutory summary judgment dated January 29, 1976, (b) the costs of collective bargaining for other groups of employees represented by BRAC, and (c) the costs of institutional programs and activities.

Plaintiffs further contend, contrary to defendants' position, that defendants' profferred refund of Grand Lodge dues set forth above provides no basis for the exclusion of evidence as to Grand Lodge activities and expenditures prior to January 1,

1976, as such evidence relates to the calculation of plaintiffs' damages and formulation of relief to be granted plaintiffs.

VII

The parties are hereby ordered to file the exhibit list called for by Rule 9(g) of the Local Rules for the United States District Court for the Southern District of California and to serve same upon one another, within sixty days from the date hereof. Within thirty days thereafter, upon reasonable notice, the parties are ordered to make available for inspection their proposed exhibits.

VIII

Within sixty days from the date hereof, the parties shall file and serve their respective witness lists, identifying said witnesses by name, address, affiliation, and title.

IX

The following issues of law remain either to be litigated at trial, or incorporated in the final judgment:

1. Defendants contend that the non-collective bargaining expenditures of defendants' System Board and Local Lodges are *de minimis non curat lex*. Whether the amounts of those expenditures (as determined under VI above) are *de minimis*, and the formulation of relief with respect to such expenditures, if they are not, remains for determination. Plaintiffs contend that the doctrine of *de minimis* has no application to the case at bar.

2. Plaintiffs contend that agency fee payers cannot be required to resort to union-administered procedures, such as a dues rebate procedure and they further contend defendants have conceded the correctness of this contention. Plaintiffs also contend that, even as to those who are formal union members, the BRAC dues rebate procedure causes an unconstitutional prior restraint, deprives them of their property without due process of law, and that through its design, structure, and operation it subjects said plaintiffs to arbitrary and burdensome requirements and economic penalties, all in breach of BRAC's duty of fair representation. Defendants assert that the October 6, 1975 dues rebate system fully meets the requirements of *Allen* as to both agency fee payers and formal union members and that they have made no concession as claimed by plaintiffs.

3. Plaintiffs contend that BRAC's expenditure of plaintiffs' dues and fees for purposes and activities other than collective bargaining with Western Airlines is not only a breach of the duty of fair representation imposed upon BRAC by the Railway Labor Act, but is also a violation of plaintiffs' federal constitutional rights. Plaintiffs contend that the Court has not ruled on this matter but has only reserved its ruling thereon. Defendants contend that the Court has made clear its position not to go beyond plaintiffs' statutory claims.

4. Plaintiffs contend that an accurate determination of the costs of collective bargaining between BRAC and Western Airlines cannot be made and that they are entitled to the return of all dues and fees paid subsequent to their protest letters, and to an injunction relieving them from future dues and fees payments until such time as BRAC has established to the satisfaction of the Court that it has implemented a system which will insure that plaintiffs are charged only for an accurately calculated amount representing their chargeable share of the costs of collective bargaining with Western Airlines. Defendants contend that the requisite determination of such costs can be made and that there is therefore no basis for plaintiffs' contention herein.

5. Defendants contend that the cost of defending these cases is chargeable against plaintiffs as a cost of administering the collective-bargaining agreement with Western Airlines. The Court has ruled for defendants on this issue, but plaintiffs intend to present a motion for reconsideration thereon.

6. Plaintiffs contend that they are entitled to attorneys' fees herein, and the Court has indicated that it does not intend to grant such fees. Plaintiffs will submit a motion for clarification and/or reconsideration on that issue.

7. Plaintiffs contend that they are entitled to a declaratory judgment invalidating alleged BRAC requirements of formal union membership, and enjoining the application of such requirements. The Court has ruled that this issue is moot upon the assertion of defendants' counsel that formal union membership is not required. Plaintiffs intend to make a proffer of facts as set forth in Plaintiffs' Pre-trial Memorandum of Contentions of Fact and Law at 7, line 4 through 8, line 2 at trial.

8. Plaintiffs contend that they cannot be charged with a share of the cost of any waste or corruption on the part of defendants. Defendants

contend that amounts so expended, if any, (as well as amounts expended by defendants through mismanagement or inefficiency, if any), are not recoverable herein, and the Court has sustained defendants' position. Plaintiffs will present a written proffer of evidence supporting their position.

9. Plaintiffs contend that defendants must demonstrate some benefit flowing to plaintiffs from collective-bargaining activities as a condition of charging plaintiffs for any portion of the costs of those activities. Defendants contend that they need not do so and the Court has sustained defendants' position. Plaintiffs will present a written proffer of evidence supporting their position.

10. On November 11, 1974 this Court ruled that the dues rebate scheme promulgated by BRAC on January 24, 1974 contained an erroneous standard as a matter of law. Plaintiffs contend that this dues rebate procedure was not a good-faith effort to comply with BRAC's obligations under *Street* and *Allen*. Plaintiffs further contend that BRAC's enactment of the operative provisions of the January 24, 1974 dues rebate procedure as an amendment to the BRAC constitution following the entry of this Court's order that it contained an erroneous standard as a matter of law, was a breach of the Union's duty of fair representation. Defendants contend that the payment under the October 6, 1975 dues rebate procedure back to the date of protest fully compensates plaintiffs for any damages they may have suffered.

11. Defendants have stipulated that strike benefits will be paid to agency fee payers with no requirement being imposed upon such persons other than that of refraining from working for Western Airlines during the time for which said benefits are paid. The Court will incorporate injunctive provisions in its final judgment requiring compliance with this stipulation.

12. In connection with order and burden of proof, defendants' position is as follows:

> Defendants will present their case in chief first at trial since, in accordance with the specific language of the Supreme Court in *Allen*, the defendants bear the burden of proving the proportion of political to total union expenditures. Similarly, defendants bear the burden of proving the proportion of expenditures for purposes and activities other than collective

bargaining with Western Airlines to total union expenditures. Absolute precision in the calculation of such proportions is not required.

Plaintiffs' position is as follows:

Defendants will present their case in chief first at trial since, in accordance with the decision of the Supreme Court in *Allen*, the defendants bear the burden of proving the amounts of chargeable and non-chargeable expenditures. Plaintiffs contend that defendants bear the burden of proving the amounts expended by them for collective bargaining with Western Airlines; further, that the defendants bear the burden of proving that amounts claimed to represent collective bargaining expenditures are accurate.

X

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and goverr the course of the trial of this cause, unless modified to prevent manifest injustice.

Date: 4-11-78

/s/ Leland C. Nielsen
UNITED STATES DISTRICT JUDGE

Approved as to form and content:

Michael E. Merrill
Michael E. Merrill
Attorney for Plaintiffs

Joseph L. Rauh, Jr.
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

- - -

HONORABLE LELAND C. NIELSEN, JUDGE PRESIDING

- - -

HOWARD ELLIS, et al, ALLEN FAILS, et al, Plaintiffs, v. BROTHERHOOD OF RAILWAY, et al, Defendants.	Civil No. 73-113-N Civil No. 73-118-N

REPORTER'S TRANSCRIPT OF PROCEEDINGS

San Diego, California

Monday, January 16, 1978

APPEARANCES:

For the Plaintiffs:

MICHAEL E. MERRILL, ESQ.
1200 Security Pacific Plaza
1200 Third Avenue
San Diego, California

For the Defendants:

RAUH, SILARD & LICHTMAN
BY: JOSEPH RAUH, ESQ.
1001 Connecticut Ave., N.W.
Washington, D. C. 20036
and
SOLOMON HIRSH, ESQ.
6300 River Road
Rosemont, Illinois

[2] SAN DIEGO, CALIFORNIA, MONDAY, JANUARY 16, 1978, AT 10:30 A. M.

. . .

THE CLERK: No. 17 on calendar, Case No. 73-113-N and 73-118-N, Howard Ellis and Allan Fails v. Brotherhood of Railway.

THE COURT: How long do you expect to take in that matter, Mr. Merrill?

MR. MERRILL: I would expect our presentation will take about thirty minutes.

THE COURT: And you, Mr. Rauh?

MR. RAUH: Well, your Honor, I have to say that I think on the four matters that are up before the Court, not on the pretrial, thirty minutes is satisfactory. I'm not sure about how much time on the pretrial.

THE COURT: Well, as to the pretrial, I propose to lock you two in the jury room until you get a pretrial order out.

MR. MERRILL: If you do that, who is going to try the case?

(Other matters called.)

THE COURT: All right, Mr. Merrill and Mr. Rauh.

Let me first say about your letter, Mr. Merrill, that you want to send to the class plaintiffs, with your suggested changes in your letter of January 6, 1978, it appears proper to me.

MR. MERRILL: Thank you, your Honor.

MR. RAUH: I didn't hear it, sir?

THE COURT: Talking about his proposed communication to the Fails class that he submitted on the 21st of December that you [3] objected to, I say that as far as I'm concerned, that letter appears all right to me with the modification suggested in his letter of January 6th.

MR. RAUH: May I be heard on that, sir?

THE COURT: Yes.

MR. RAUH: May it please the Court, the modification is not on the major points, your Honor. The major point is this: Mr. Merrill is telling this class what is not so. He is telling them, your Honor, that if they don't resign, they won't get the benefit of your Honor's Paragraph 22 ruling for the future. That is not true.

THE COURT: Well, he doesn't say that they won't, but he says that they might not, and they might not, as I view it.

MR. RAUH: No, there's no chance that they won't, and I want to explain why, sir.

Your Paragraph 22 ruling is an extension of Street and Allen. It said that Street and Allen stand for the proposition different than I believe they stand for but that's the law of the case, that Street and Allen mean nongermane, noncollective bargaining items must be returned all apart from political and ideological causes.

Now, Street and Allen have always applied to members in the formal sense and fee payers. The logical extension will always apply to members and fee payers and I stipulate right here on the record that whatever the ultimate decision of this Court, upheld on appeal, on the nongermane, noncollective bargaining items, they [4] will apply equally to members as to nonmembers and this idea that they might not apply to nonmembers simply isn't so. Whatever is decided will apply to nonmembers and to members identically as we now apply Street and Allen identically. Indeed, the rebates that go out now under the October 6th rebate plan, October 6, 1975, go to members and nonmembers. Nobody ever thought that there was any difference. Nobody has ever suggested in this case that there's any difference, and I stipulate that there is no difference as far as the union is concerned. They'll both get whatever is ultimately decided should be rebatable and, therefore, the letter is on a false premise. It will induce people to resign on the theory they have to in order to get the advantage when I now stipulate that they don't have to in order to get the advantage, and I most urgently ask your Honor to reconsider because this is a very important matter.

THE COURT: I don't think there are enough people involved that it makes that much difference, Mr. Rauh.

MR. RAUH: It makes a great difference in principle. We believe that whatever is decided is the same for both groups. Furthermore, I don't know exactly why they are so anxious to have these resignations since we'll appeal, since we'll give them the same thing whether it's the one or the other. I think the letter ought to be accurate. The letter goes out with your having not objected to it, and I think the letter ought to be accurate. There's never been a suggestion in this case, in any other case, [5] in any literature, in anything, that there's a difference between the two groups as far as getting their rebates and I hereby stipulate, as I said before, that there's no difference. And I just plead with you not to allow a letter to go out that is clearly erroneous.

THE COURT: Mr. Merrill?

MR. MERRILL: Your Honor, the principle having importance here is not one of equal treatment of members and agency fee payers in terms of returning to them, or refraining from spending a portion of their dues. The principle to which Mr. Rauh has not adverted is BRAC's desire to maintain disciplinary control over these people so that they will always act at the beck and call of BRAC officers whom they have gone to considerable length to state a disagreement with.

Now, Mr. Rauh cannot conclude the Supreme Court or this Court or the Ninth Circuit by his stipulation as to what may happen in the future and just as the Supreme Court did in Scofield, so will they in this case, find that one who remains a member of the union is subject to its disciplinary control, subject to its internal administrative rules. There isn't any mystery at all in my mind as to why he's straining so hard to keep those people in the corral that were pushed in there by an admittedly unlawful union membership requirement. I think the issue is that simple. If he wishes to appeal to their loyalty, if his client wishes to sell them on the virtues of remaining formal members, they are absolutely entitled [6] to do so, again within the confines of this Court's order. I think that he is asking this Court to preserve the effects of admittedly unlawful coercion when he says we cannot communicate with them to advise them of our own opinions as their representatives as to what the consequences are of remaining members as opposed to agency fee payer status.

We could be wrong. He could be wrong. I think that he ought to put forth his view and let the persons most concerned with this issue decide for themselves. They have never been told what difference it may make to be an agency fee payer as opposed to a member, and we know from

reading the cases, that it makes a lot of difference. The Ninth Circuit specifically said in the Hershey Food case the difference is more than semantic, and I think that these people are at minimum entitled, in view of this defendant's method of having conscripted them in the first place, to find out that the difference is more than semantic. Thank you.

MR. RAUH: If your Honor please, the point Mr. Merrill makes about the discipline--he has every right to tell them that. There is a difference between a fee payer member and a formal member on the discipline. I don't question he can tell them about that. He can tell them about any difference that exists, but I don't think he ought to be allowed to tell them about a difference that doesn't exist, your Honor.

THE COURT: I'm happy with the letter, with the January 6th modification, gentlemen.

[7] We'll hear your motion for summary judgment, Mr. Rauh, and protective order.

MR. RAUH: May it please the Court, we have two motions for summary judgment pending, one on the local lodge and Systems Board expenditures for noncollective bargaining items, and one on the political expenditures rebate program to be put into effect on October 6, 1975. We have tried to isolate two areas where there are no factual differences and I have read the opposition to the motion for summary judgment and they have come up with no substantial factual differences and I'll show your Honor as I go along here, but there's a very significant point here in the opposition.

On pages 11 and 12 of the opposition, if your Honor has it there, you will see that exactly what I am trying to do is what Mr. Merrill does not want me to do. I'm trying to isolate so we can get some things decided so the trial is not going to be a gigantic and unwieldy matter.

Mr. Merrill is suggesting that there is something bad at the bottom of 11 and the top of 12 in trying to separate problems. He says it's a pointless aggravation to try to separate the problem. He says fragmenting those activities is bad. We are never going to do it, get this thing over, unless we do try to separate out items as to which a decision can be made. Otherwise, we're just going to have some kind of general hodgepodge at the trial that I think would be very time consuming. I think that

the two [8] motions I made will get this case down to manageable proportions: namely, what does the grand lodge spend its money on?

Turning first to the local lodges and Systems Board expenditures, on pages 3 and 4 of our Points and Authorities, we go into the facts as they are shown and sworn to out of the second supplementary answers to the Sixth Set of Interrogatories. Now, we show that it comes down to less than one-half of one percent. We show that it's a matter of, for the Systems Board, a penny and a third per month; for Local 3049, the big one, four and a half cents a month. The whole thing comes down to a very, very, very small amount. The whole thing comes down to far less than the Ninth Circuit called de minimis in Northern v. Nelson, 448 F.2d 1266 in 1971. That was an issue of denial of religious freedom to the Black Muslims, and seven copies of a newspaper were taken and it came to a value of a dollar O five, which is much more than a year's rebate here for the local lodges and Systems Board, and the Ninth Circuit said that's clearly de minimis.

Now, what do the plaintiffs say here in opposition to de minimis. They make one argument that the Seay case answers this and they quote from the Seay case on this point. What they overlook is what the machinists were trying to do in the Seay case--get out of the whole political expenditures problem. They were trying to say that the Supreme Court was wrong in Street and Allen and that the whole thing was de minimis. The Supreme Court decided that the political rebates were not de minimis. We're [9] not suggesting that we don't have to do some rebate here. We recognize that if your Honor's Paragraph 22 ruling is upheld, there will be substantial rebates from the grand lodge. It's something like fifty percent in '76 and thirty-five percent in the first half of '77, is what our figures show, but we don't challenge that there has to be a rebate. What we say is that in the grand lodge, in the local lodges, and the Systems Board, these are so small that they come within the Court of Appeals' decision of de minimis in the case I have cited.

Now, there's not a single fact in here that is controverted on the local lodges and Systems Board. There are three things they suggest. First, that we dealt with 1976. We actually dealt with 1976 and the first half of '77, which is the last thing for which there are figures. If we had taken an earlier year, they would have said, well, my goodness, you're choosy, so we chose the last figures, the best figures: '76 and the first half of '77 which are the last that are available. They are all in the record and we

said that we think your Honor can rely on this as typical. They made no showing why these years are anything atypical.

Secondly, they say in an affidavit by a research assistant in the National Right to Work Group that the figures are incomplete. That's not an answer, your Honor. You have to say where they are incomplete and in what respect. There isn't one figure given that in any way suggests they are incomplete. There is no [10] example of a mistake and, finally, they say as their third point on this affidavit that--

THE COURT: They say it's incomplete, inaccurate, and cannot be independently verified.

MR. RAUH: Well, yes, they can. They have got every single piece of paper we have. They have all of our records. They have got all our audits, your Honor. They have been through them, and yet they haven't come up with a single contradiction of what we did for '76 and '77 on the local lodge. They haven't come up with one, and they have all the papers. We are not--my God, the discovery has gone on in this case for five years. They have every paper we have got on how we spend our money, and yet their answer is that it's incomplete, and then they make one other point and this point I want to explain to your Honor because actually we have been, as I think we have generally been here in our figures, leaning over backwards. They say that we represent--that is, the three local lodges, the Systems Boards--some employers other than Western Airlines.

Now, I wish your Honor would turn, if I could persuade you, to the chart on page 3 of the second Points and Authorities. They were all put together, the Notice of Motion, Motions for Summary Judgment, Memorandum of Points and Authorities.

On the top of page 3 of the Points and Authorities on the local lodges and Systems Boards, there is a chart--

THE COURT: All right.

[11] MR. RAUH: Look, if your Honor please, what we have compared is something that works out in their favor. You will see in line 1: "Total dues income, WAL employees."

Then in line 2, you will see, "Paragraph 22 expenditures." In other words, we included the Paragraph 22 expenditures of these other employers, but we didn't include the income, so that the actual amount of expendditures on Paragraph 22 items is a smaller percentage. We did

this--I did it very deliberately--we did this to show that we're not spending money on Paragraph 22 expenditures for these other employers that isn't included here. Actually, if we put in the income from them, the figures would be lower than they are by the small amount. I think about five percent of the people involved are other employees, but it would be a smaller amount by something like five percent. Actually, when you have a local union meeting, if there's something social, the same people eat the same sandwiches and, therefore, we're including the expenditures under Paragraph 22 for these other employees but we're not including their income so, in fact, they are getting the advantage of a smaller figure, of a smaller figure that would be in effect if we had done both the income and the outgo, so what you have here on the local lodges and the Systems Board, it seems to me, if your Honor please, is that we have shown that the thing is de minimis. We have shown that there are no factual contradictions other than these three that I have explained: the other employers, the word "incomplete" and [12] the use of the '76 and the first half of '77, and we mos' respectfully request that the motion for summary judgment on the local lodges and Systems Board be granted.

Would your Honor like me to go on, or would you like to rule on this one?

THE COURT: Go ahead.

MR. RAUH: On the other one?

THE COURT: Yes.

MR. RAUH: Yes, sir.

On the political expenditures, your Honor, their primary argument here is a legal one again. First, on page 2 of their Opposition, they argue that the pending motion has already been heard. It has never been heard, if your Honor please. Anything that happened prior to our entry into the case was before this program was adopted. This program was adopted in October of '75. The motion for summary judgment that they were making at that time doesn't in any way apply to the implementation, the implementation that really matters.

They argue nonmembers cannot be compelled to participate in the rebate scheme. They can't be compelled, but we are giving them the money. We're giving everybody the money--the agency fee payers and

the members. How are they going to get money back unless they participate? We're willing to give it back, but we have to give it to someone and so we're giving it to them.

Now, they say that any rebate scheme is a violation of law. [13] This is on page 4. Any rebate scheme constitutes an unlawful prior restraint. That's page 4 of their document, their Opposition. If that's true, the Supreme Court doesn't know what it's talking about. In the Abood case on page 1802, there appears this statement: "Recognizing the difficulties posed by judicial administration of such a remedy, namely, on the political expenditures, the Court also suggested that it would be highly desirable for unions to adopt a 'voluntary plan by which the dissenters would be afforded an internal union remedy'."

That's quoting from Allen. Then going back to Abood: "This last suggestion is particularly relevant to the case at bar for the union has adopted such a plan since the commencement of this litigation. Footnote 41," and this is the Footnote 41: "Under the procedure adopted by the union, as explained in the appellee's brief, a dissenting employee may protest at the beginning of each school year the expenditure of any part of his agency shop fee for 'activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment.' The employee is then entitled to a pro rata refund of his service charge in accordance with the calculations of a portion of the total expenses for the specific purposes. The calculation is made in the first instance by the union, but it is subject to review by an impartial board."

It's exactly what we are doing. Indeed, it's a copy of what [14] we did in October. They did it much later while the thing was before the Supreme Court and the Supreme Court has clearly approved the idea of a rebate. What else could you do except to rebate, your Honor?

The plaintiffs put us in this dilemma. You have got to have a precise figure, and then they want you to have it ahead of time. Well, you can't have a precise figure on what you have spent before you spend it. Now, as far as we're concerned, you might very well try to guess at the figure. That would be easier for us than to have to do what we do, which is to sit down very carefully and to figure it out, so if any rebate scheme constitutes an unlawful prior restraint, it means you have to do it ahead of time, before you have the figures, and it means it can't be precise, which is exactly what they are demanding.

Then on page 6 they say: "Committing plaintiffs to a Union-administered rebate scheme violates elementary Constitutional rights." I know of no other way to do it except the way that we are doing.

On page 7: "BRAC's rebate plan subverts its burden of proof." On the contrary, we have put in all the facts on the rebate plan and have met it. We have shown exactly what is done. The affidavit which was attached to our motion for entry of final judgment specifically states how we got the figures, what the figures are, and, in fact, in addition, that it was the highest figure of any union in the country. It isn't on that I rely. It's [15] on the fact that we have done it carefully. They have shown no figures to the contrary, and that should be sufficient for a motion for a summary judgment.

On page 8 they then say: "Union rebate scheme contravenes limitations period of Labor-Management Reporting and Disclosure Act" because you don't get it for four months. Well, you can't get it until it's over, until the period is over, if you're going to figure how much it is, so then, finally, they make a very minor argument that we have not done it right. What they do is to quote a letter from a Mr. Ross fifteen months ago which, incidentally, is rather kind to us. It says at the end here on page 4 of the letter--it's the letter of October 25, '76--that Mr. Merrill, from a Mr. Ross who--it's Exhibit AA to the Meisinger affidavit--says, "Based on the data that was submitted on the RP Forms, BRAC's accounting data processing department did an adquate job tabulating the information."

THE COURT: Read the next sentence.

MR. RAUH: They say we didn't get it in, but they made no case for the fact we didn't get the material. We did everything humanly possible to get it in, and if there is any slightest chance to get the material in, we have done it, so what they are saying is that because a man wrote them a letter, not even a sworn affidavit--it's nothing but a letter fifteen months ago--that he didn't think we got it all in, he doesn't suggest we didn't make superhuman efforts to get it in, if the answer is that it has [16] to be perfect precision, then I don't believe you're ever going to have a program that meets those standards. We did go and we tried to get all the information in. We have done our best and of what we got in, we have tabulated them. I know of no other way that the thing could have been done other than the way we did it, and their fifteen-month-old letter that we didn't get all the information in I find erroneous.

You will notice, your Honor, that this is a million dollar program. We have over a million dollars in the political thing. Only a very few people ask for it back, but the amount of actual mistakes they found were one $66 and one $275, which wouldn't affect the procedures. What they found wouldn't affect the results at all, percentages.

Now, your Honor also asked me on the motion for protective order, I believe you wanted to hear that at the same time.

THE COURT: Go ahead.

I should say in that regard, when Mr. Bobo comes to this court, he will be answering questions like Mr. Merrill was asking him in his deposition, and I assume he'll be here at the trial.

MR. RAUH: He's on our witness list, yes, your Honor, on our pretrial memorandum.

On July 25th we were before your Honor on our motion to terminate discovery, or in the alternative, to vacate the interlocutory summary judgment. At the conclusion of my argument, your Honor granted the motion for terminating discovery. Then [17] Mr. Merrill asked if he could have some discovery not related to the waste issue and your Honor said, "Yes, I'm terminating discovery only on the waste issue." Then you said, "But I think the rest of it is practically finished."

Then Mr. Merrill answers, "Well, sir, we have some discovery of their accountants and their comptrollers to ascertain what the records will and won't show. We have discovery as to exactly what was taking place because, as the Court knows, their record keeping in the past did not reflect activities undertaken, so we need some personal inquiries on those points."

On that basis we went forward six months ago after your Honor had indicated that the thing was practically finished and this is what happened since then.

We have had a Sixth Request for Interrogatories, Seventh Request to Produce, all of which has been given. Then we were before your Honor here on the 19th on a motion for entry of final judgment, which was denied. The day before that 19th hearing, plaintiffs sent out a Notice of Deposition of eight more depositions. On that basis they asked--this is on

November 19th--for more time. Although they didn't mention the depositions, they mentioned office sickness and asked for more time for the pretrial hearing. Your Honor turned to me and asked me where I stood on that and I answered your Honor saying we were ready for pretrial, and that they were only doing this to try to get more time for more depositions six months after your Honor had said discovery was [18] practically finished and your Honor ruled, "We'll leave the pretrial date as it is."

Now, despite the pretrial date being left as it was, Mr. Merrill went ahead with those eight and added four more four days later. At the very time he should have been preparing the pretrial, he tried to go ahead with twelve depositions. We did not ask for a protective order on any of the twelve. We went ahead. They took one deposition from each of the local lodges, two from the Systems Board, and the president of the union.

There's only one person there that this motion for protective order involves. When we get to the pretrial conference, I have another proposal, but while Mr. Merrill was violating the pretrial rules by not calling a meeting, by not filing his pretrial statement, by not filing the pretrial order, by filing an inadequate pretrial statement two weeks later, we went ahead with all these depositions. Well, with the exception of the one here which is the one involving a man named Jack Reese. This deposition was noticed, after your Honor had refused additional time on the pretrial, for Salt Lake City on a Saturday. We thought that was a very difficult thing to harass us with, to go to Salt Lake City on a Saturday when there were going to be some depositions in Chicago.

We told Mr. Merrill that we were going to have it in Chicago and we would bring Mr. Reese there, and this is what Mr. Merrill said. I'll quote Mr. Hirsh, and then Mr. Merrill. Mr. Hirsh [19] said Mr. Merrill said since we, defendants' counsel, were giving him a hard time refusing to postpone the pretrial, he, Mr. Merrill, was going to give us a hard time, and if it would cost us more in Salt Lake City, that was fine.

Mr. Merrill then answered Mr. Hirsh and I put this on the record--this is what he said: "Sol, Rauh is giving me a hard time for no particular reason and we do have to work together on this thing for a lot of years yet. I am not inclined to accommodate your convenience when there is no courtesy or consideration being shown for mine, and, therefore, I would just as soon take the deposition at Salt Lake City even if it's more convenient or cheaper for you to take it in Chicago."

Now, we couldn't believe he would persist in that, and we brought the witness to Chicago to take the deposition. I think maybe this was a Freudian slip by Mr. Merrill when he said, "We're going to be together a lot of years yet." I though your Honor in July was trying to get the discovery over when you said it was practically finished. Then we turn around and after your Honor sets the pretrial way back in October for today, and then it was tried to be changed in December 19th and your Honor overruled that. Then instead of complying with the pretrial, we went ahead with depositions. We are now told that now he wants to go ahead with Mr. Reese whom we brought all the way to Chicago, and I most respectfully request that that motion for a protective order be granted.

[20] I also hope that at the opening of the pretrial, I can make a statement about how we can get ahead with that.

Thank you, your Honor.

THE COURT: Mr. Merrill?

MR. MERRILL: I would first like to present Mr. Hugh Reilly to the Court. He is with me here today. He's been associated as counsel in this case for some time. This is his first occasion out here.

Let me address briefly, if I may, some of the points that Mr. Rauh raised. They have been treated so often in papers submitted to this Court and in arguments submitted to this Court that I shall do my best to refrain from burdensome repetition of those things.

Mr. Rauh pointedly avoided his usual statements about union good faith and that, of course, is one of the integral elements that even the Reed court which the Ninth Circuit has twice taken issue with found as as a prerequisite for a union rebate plan. Now, in good faith in this case, we have noncompliance, purposeful noncompliance, with Street and with Allen for year after year after year. They don't acknowledge the protests from our people. They are carefully written and sent by certified mail. The reason they don't acknowledge those, and the reason that they don't take any steps to record their political expenditures is because there are so few plaintiffs.

They then enact three admittedly deficient dues reduction or dues rebate schemes. They come here to you today asking you to take [21] on

faith their own statements as to the accuracy and the completeness of their accounting records. They retain Haskins & Sells, a widely respected accounting firm, to do auditing work for them. They have financial resources that are extremely impressive. Mr. Kroll testified two weeks ago that he expects to show a million dollars in the black this year. Where is even the most humble disinterested witness to say that their efforts, (a are reasonably accurate; (b) are made in good faith; (c) comply with anyone's accounting standards? We have none of that. We have admitted guesstimates. At best, they are guesstimates. We have guesstimates for 1976 that are supposed to be accurate for 1971 and for 1986.

Now, in that regard, we do have some developments. In my hand is a brochure issued by BRAC called PEP. It's the word for BRAC in '77, and this comes from Mr. Fred Kroll, the International President, and in that he says: "In this Union, we have got a big job to do this year."

His first point is to win updating legislation. The second one is to "build our political and legislative muscle for this year, for election year 1978, and for the future."

He describes the PEP program. He says it stands for BRAC's political education program. "We're asking local lodges and Systems Boards to help finance PEP by donations from their treasuries because the needs are greater than the grand lodge can budget by itself."

[22] Inside he talks about the railway clerks political league and he says, "It is part and parcel of BRAC."

On the next inside page, he talks about the job ahead for the union and that includes, "running week in, week out, legislative drives for the bills we need."

On the final page, he says, "Local lodges and Systems Boards will want to give ample donations from their treasuries."

Now, does that sound like stable expenditures, or does that sound like increasing the political expenditures from local lodges and from Systems Boards and probably from the grand lodge, none of which is contemplated by Mr. Rauh's presentation today.

We have gone to a good deal of expense and trouble to hire two certified public accountants and expose them to the voluminous records that

BRAC maintains, and they are in agreement. They say you cannot compute accurately BRAC's political expenditures. In that, their opinion is joined by Russell Wende, BRAC's own independent chief auditor. They say you can't compute BRAC's collective bargaining expenses given their present system. Mr. Wende joins them again.

Again, speaking of good faith, when I deposed one of the grand lodge trustees and asked him how they arrived at these political expenditures figures for 1974, I said, "Mr. Schrader, did you look at the records of the grand lodge legislative fund?" and he said, "No, we didn't." Didn't even look at them. Now, if that's a good-faith effort to compute political expenditures when **[23]** this Court had specifically included legislative activities within the scope of nonchargeable political costs, then I'm badly mistaken.

Again, on bad faith and again on recent evidence, Mr. Kroll in his deposition two weeks ago, one of the very few questions he was able to answer, finally was forced to admit as the papers submitted to this Court show, that not all of the time spent on the PEP program is going to be rebatable. That is a blatant rejection of Mr. Rauh's assertions and of the rulings of this Court.

Now, with regard to the rebate program functioning, Mr. Kroll was not allowed to answer questions as to how employees are supposed to wend their way through the thicket of the rebate appeals. Can they be represented by counsel? A seemingly innocuous and irrelevant question. He was not permitted to answer that.

Mr. Rauh says that we want perfect precision. We are not demanding perfect precision, but the Supreme Court in Allen had some measurable accounting standard in mind. They said absolute precision is not to be required. Obviously something less than absolute precision would be acceptable, but they didn't say that a guess is acceptable. I don't see how they could when they're talking about important rights at that point in time that now have been designated as clearcut First Amendment rights. How can a guess in the scope of someone's First Amendment right comport with all of the rules of law and cases that we have had in the Supreme Court?

If BRAC wants to set up a good-faith accounting scheme that **[24]** will, with reasonable accuracy, comport with accounting standards and project the collective bargaining expenditures, they can do it; I have no

doubt. They don't wish to.

There are many more complicated accounting problems in this world, I'm sure, than doing that, and I'll give you an example of where that is done regularly. In Hawaii, the Hawaii Public Relations, Public Employees Relations Board, computes every year the amount tht the teachers union, for example, spends on collective bargaining, and that is the amount that determines the agency fee. It's not an insuperable task; it can be done.

Mr. Rauh would have you believe that the Supreme Court has wholeheartedly and enthusiastically embraced any rebate scheme that a union may care to create. It's plainly not true. He didn't finish reading the Abood quote when they specifically and pointedly said, "We do not determine the constitutional sufficiency of any such plan." And I don't see how you can possibly square the clearcut delineation of constitutional rights with a rebate scheme that requires someone to surrender those rights for a period of a year or as long as four years. There isn't any doubt in my mind as to why Abood did speak wistfully of union rebate schemes. These litigations are tedious, as this Court knows far better than I, and the Supreme Court, having Street and Allen before it, surely knew that, so they were looking towards some measure that would satisfy a lot of complaints and perhaps this union rebate scheme will satisfy a lot of complaints, **[25]** but that does not mean that those plaintiffs who are dissatisfied with the union's calculations and insistent upon a judicial determination of their rights, cannot have that judicial determination.

I saw recently in the Wall Street Journal that the Ford Motor Company, in an attempt to resolve customer complaints in North Carolina, has established a citizen board to hear those complaints and try to determine them. Does that mean that if you buy a lemon from Ford in North Carolina that the doors of the courthouse are closed to you? I don't think so.

We are talking about rights that are much more important than defective cars here, and we do have good guidance in the cases. The Marine and Shipbuilding Workers Union tried to keep their own members from expressing complaints to the National Labor Relations Board about internal union doings, and the Supreme Court said that is intolerable. The question of being fined for exercising your statutory rights is not one the union can keep to itself. It's one that is in the public domain, one that must be presented to a governmental agency, and in this case, there is no

administrative agency to determine constitutional rights. They cannot close the doors of this courthouse to our plaintiffs.

From a procedural standpoint, which I think is the far less important basis to reject the motions for summary judgment, they simply don't meet the standard of conclusive proof that is their obligation if they wish to prevail on the motion [26] for summary judgment. We have at minimum sharply contested issues of fact here as to Mr. Ross' affidavit and the affidavit of Susan Meisinger. They say they have calculated political expenses and other noncollective bargaining expenses, but we have deposition testimony that they have not. There are no indirect local expenses connected with politics in those rebates. There is no accounting for the organizing costs of the Systems Board. We elicited testimony two weeks ago from Caroline Seel, General Secretary-Treasurer of that body, which says that their organizing costs are not entirely reimbursed, but we do not find those in the defendant's calculations.

Now, unless the Court has a question at this point, I'll speak briefly to Mr. Rauh's motion for protective order with regard to the deposition of Mr. Reese.

THE COURT: Go ahead.

MR. MERRILL: That deposition was originally noticed in Salt Lake City because that is where Mr. Reese lives and works. I was not able to take it in Chicago because of the time pressures involved in preparing our pretrial statement which was admittedly late and for which I apologize. I do submit that our pretrial memorandum is a much more comprehensive effort to outline the scope of things stated in the local rules than that proffered by Mr. Rauh. In any event, I was unable to depose Mr. Reese in Chicago and I told Mr. Rauh's associate so the day before on two occasions and left no doubt whatever that I would not under [27] any circumstances depose Mr. Reese in Chicago that week. Prior thereto, I had spoken with Mr. Hirsh about taking Mr. Reese's deposition in Los Angeles last Friday along with another deposition to be taken. Mr. Hirsh raised no objection during that discussion. I noticed the deposition for Los Angeles at the date and time and place discussed with Mr. Hirsh. Now, they brought Mr. Reese to Chicago either to make me look bad, which I think was a highly unsuccessful attempt, or for other business reasons, and I just can't see any ground whatever for precluding me from obtaining Mr. Reese's testimony.

Now, I asked Ernie Mogg, who is the General Chairman of the Systems Board, which was Mr. Reese's old job, if he was able to compute the amount of time that Mr. Reese spent on collective bargaining and I asked this question on page 114 of the Mogg deposition:

"So, if you were to try and arrive at a figure of the amount of his time . . ."--referring to Mr. Reese--"he spent on things other than bargaining activities with Western Airlines, it would be a guess, wouldn't it?"

Answer: "That's right. Like I say, I knew most of the time when he was traveling and what for."

If the Court feels we're entitled to attempt to accurately determine whether or not they can account for their noncollective bargaining expenditures, I submit that that is the most relevant question that could be asked and, obviously, it has to be asked **[28]** of Mr. Reese because Mr. Mogg doesn't know and no one else knows because they don't maintain the time records or other records that comprehensively detail the way in which the salaried officers spend their time.

The Reese deposition and other depositions, I think, should be resumed under conditions to be controlled by the Court, and we can discuss that in conjunction with the pretrial matters.

THE COURT: I think the time has come to stop all further discovery, Mr. Merrill.

MR. MERRILL: Well, your Honor, I would only submit that the Court may be getting a little bit ahead of the record. We have deposition transcripts that are en route to us and I think that if the Court had the benefit of seeing the type of questions we were foreclosed from asking, foreclosed from getting a response to, you'd feel differently.

THE COURT: I think we'll end the discovery. It's been five years now and I think that's long enough.

MR. RAUH: May I have just one minute on one of the earlier points, sir?

THE COURT: Yes.

MR. RAUH: The PEP document, if your Honor please, is in '77. Every dime of the PEP money will be rebated in '78 when we now get to it. In fact, they have all been ordered to put in the PEP material.

Secondly, with reference to Mr. Wende, the thing he testified **[29]** to that was told you was that in December 17th, 1974, the whole year before the program we're now asking your Honor to validate. I guess to call it a guess simply means that no one has looked at the reports of the board of trustees. They are attached. Both of their reports for '75 that was done in '76 and the '76 that was done in '77. Both of those reports are in there. They are full and exhaustive studies and we really believe to call those a guess is ludicrous. What is happening here is that we are trying to isolate some of the problems so we can go forward, and we respectfully request that both of the motions for summary judgment be granted.

THE COURT: I don't think I can grant them, Mr. Rauh. The motions for summary judgments are both denied.

The protective order motion is granted.

MR. RAUH: I take it, it's a general protective order now against all further discovery?

THE COURT: That's right.

MR. MERRILL: Your Honor, may I mention just one point in that regard?

THE COURT: Yes.

MR. MERRILL: In our pretrial statement we need to establish damagesas to some of those persons who have either had interrupted service or terminated service with Western. Some may have come back and I would have proposed that we send them an interrogatory to elicit the actual amount of dues that would have been reflected **[30]** by that interrupted or terminated service. I think that's the easiest way to establish precise dollars that each plaintiff would be entitled to.

THE COURT: No, I think we can establish that through your own plaintiffs.

MR. MERRILL: Your Honor, some of these people are as far away as Alaska and Hawaii.

THE COURT: You know where they are, however. I don't think so.

Under our rules, you gentlemen are supposed to get together and present me with a pretrial order. Now, I know, from listening to both of you many times, that you are not going to agree at all on what the issues are, but that doesn't change the situation that you are supposed to present the Court with an order, and I have been through this before in other cases. What you have set out, plaintiff claims these are issues; defendant denies that they are, or defendant claims these are issues and plaintiff denies they are, but they should all be set out.

I'll listen to you again at 2:30 about the pretrial order.

MR. RAUH: Thank you, your Honor.

(Noon recess.)

[31] SAN DIEGO, CALIFORNIA, MONDAY, JANUARY 16, 1978, AT 2:30 P.M.

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THE COURT: All right, Mr. Rauh, what do you have to say about pretrial?

MR. RAUH: May it please the Court, this morning when your Honor referred to locking up counsel--

THE COURT: It wasn't completely in jest either, Mr. Rauh.

MR. RAUH: I wouldn't waste your time--

THE COURT: I'd assign a marshal to keep any peace between you.

MR. RAUH: When your Honor said that, I didn't think your Honor was trying to be unfair. I think your Honor was unfair in the sense that I think you kind of had the attitude of the failure here as a plague on both your houses, that you're both wrong. I want to make clear to your Honor that we have tried to do our best to comply with the rules. The noncompliance was on the other side. The noncompliance lay in a two week late pretrial memo. They never requested until after the court this morning for a meeting which I couldn't do at noontime, but which we are ready to do this afternoon--not a draft order--a first statement that

they were going to give a unilateral order and making an inadequate pretrial memo. I think it's a little unfair and I don't say your Honor meant it to be unfair because your Honor may be under the impression that we, too, may be at fault, but I would like your Honor to know, and I want the record to show that I feel I have done a conscientious **[32]** job of trying to comply with the rules, especially rules that are somewhat difficult and new for me, but despite that, I think I know Rule 9 pretty well by heart by now.

Now, the question is, "So what?" and I think that would be a pretty good question for your Honor to ask me: So what? I have looked at Rule (g)(2) and it provides for a dismissal when compliance with the rules for pretrial have not been adequate. I think it would be silly for me to get in front of your Honor and say I want a five year old case dismissed because they didn't comply with the pretrial, and I'm not going to do that. I do feel, however, that we're entitled to make a proposal based on the fact that we have been sinned against and are not the sinner in this regard.

I suggest that we treat this as a first pretrial under Rule 9(g)(5). Rule 9(g)(5) says: Where the case is complicated or may be protracted, the Court may use the first pretrial hearing as a preliminary pretrial conference to lay out a program of future and additional pretrial meeting or meetings.

My feeling would be this: I think we could make some progress this afternoon on issues. For example, Mr. Merrill has re-raised a number of issues that I think your Honor has decided against him. I think we could put that to rest. I think the problem of the burden of proof might well be set to rest. We have made a request for a stipulation which we would pay the full grand lodge dues for the first five years--for the earlier years before '76 and **[33]** '77. There are some problems about the witnesses, so that I would suggest that we go ahead as a pre, pretrial to try to make as much progress as we can. Then, it seems to me, since the burden of going forward is on plaintiffs' counsel and since he didn't accept it, plaintiffs' counsel be directed to draft an order as best he can, based on the decisions your Honor makes this afternoon on the various points we could discuss, and maybe Mr. Merrill has issues that he wants to raise, and that he be directed to send us the pretrial as he drafts it and if there is not agreement, then the conference we would hold of nonagreement be held in Washington because of his failure to comply with the rules.

I find this a very minor sanction for which I'm asking in view of the fact that the national headquarters of the National Right to Work Organization and Mr. Reilly's place of business is in Washington, or Alexandria across the river, so I don't think I'm asking something too drastic in suggesting we go ahead as a pre, pretrial in an effort to get on with the trial.

THE COURT: Yes, I'd sure like to do that.

MR. RAUH: And I'm ready whenever you are to bring up some issues, but I thought maybe you'd want to hear Mr. Merrill on my suggestion.

THE COURT: Yes.

MR. MERRILL: I think the suggestion is sensible, your Honor, and--

[34] THE COURT: That's the first time you have agreed with Mr. Rauh about anything in this case, isn't it, Mr. Merrill?

MR. MERRILL: Well, I certainly don't agree with the preliminary remarks, and I could beleaguer him as he beleaguered me with comments of noncompliance of various things. His proposed pretrial order would be a joy for me to stand as is because it lists no witnesses and no exhibits, proffers no proof whatever as to the Systems Board and local lodges, and I would love to have that duck already in the bag instead of having to go out and sit in the fields and shoot it. But I recognize that he was a little over-confident in anticipating his motions for summary judgment having been granted, and on this occasion, as on previous occasions, we are seeking a decision from this Court based upon comprehensive facts, not upon defaulted facts or assumed facts, and issues foreclosed because of procedural mistakes on the part of counsel, whichever side might have made those mistakes, so I'll join with him in that request, and I would hope that we can move expeditiously through it. A case of this bulk--

THE COURT: I suggest at first that you two do confer and, actually, the jury room is a convenient place for that conference and I'll be available all afternoon. When you think you have reached a complete impasse, we'll come back into open court and if we can't get things ironed out satisfactorily today, I might look with favor upon Mr. Rauh's request. I have to be in Washington [35] on February 2 and 3, and it's presently anticipated at least that my committee meeting should be over

by noon on Friday, the 3d, so that I could have a hearing back there on the afternoon of the 3d. That may get fouled up because the chairman of my committee has a fifty percent chance of being named the director of the FBI. That may make me the chairman of that committee and that might make it more difficult but at this time I see no obstacle to that.

MR. RAUH: Is that Judge Webster?

THE COURT: Yes.

MR. MERRILL: I appreciate your Honor's willingness to go to those lengths. I don't think that will be necessary. I think we should be able to reach an agreement on what we disagree on this afternoon.

THE COURT: I would think so, too.

MR. RAUH: May we come back--

Let me give an example of where I think there is a disagreement.

THE COURT: All right.

MR. RAUH: If you will look on Mr. Merrill's pretrial memorandum of contentions--

THE COURT: I don't have that in front of me.

MR. RAUH: --of fact and law.

THE COURT: Go ahead.

MR. RAUH: On page 10, Mr. Merrill suggests the waste issue **[36]** is still in the case. I think your Honor ruled that out.

THE COURT: I think I ruled that out.

MR. RAUH: On page 13, Mr. Merrill suggested the benefit issue--that we have to prove benefit of the collective bargaining--was ruled out by your Honor and I believe you have ruled that out.

THE COURT: I think I have ruled that out, but I think I have also ruled that you have the burden of proof.

MR. RAUH: Yes, your Honor, you have ruled that. I'd like to clarify that, too. We may solve everything in the next few minutes. I'd like to clarify the burden of proof. You said flatly that I had the burden of proof on the Street and Allen expenses.

THE COURT: Right.

MR. RAUH: On the political expenditures, and I agree with that.

THE COURT: I think you have the burden of proof to show collective bargaining expenses.

MR. RAUH: All right, your Honor. I accept that, so there's no argument on that point. The burden of proof is settled. It's one of the items I said--

The benefit and waste issues are settled.

The other one I thought that was settled, your Honor, was that this case was an expenditure on the administration of the collective bargaining agreement because if you will recall--

I'll get the document.

[37] THE COURT: All right.

MR. RAUH: --on October 31st we were arguing the plaintiffs' motion to compel discovery and one of the interrogatories had demanded, had requested information as to our expenditures on this case and in your order, you granted the motion to compel in Interrogatories 1 and 2 about collective bargaining expenses, and you denied the motion to compel on the basis of the question dealing with the cost of this case after I had argued that nothing could be clearer on the administration of the collective bargaining agreement than to decide what the collective bargaining agreement meant in relation to refunds that would go to members and agency fee payers, and you then denied the rest of the motion to compel, including the motion to compel on that item, so I thought that item, too, was out of the case: namely, the cost of this suit.

THE COURT: I think it is.

MR. RAUH: I don't think we have any problems. I would think the order now is pretty clearly draftable.

May I ask this question because I'm not familiar with your procedure. Mr. Merrill put in his exhibits in the order, and we'll put our exhibits, and I think the order may not be by consent, but may I ask this: In the procedure here, at what stage--I have two questions; I'm sorry. It might be helpful and it may solve everything--at what stage does one raise the question about exhibits? During a pretrial or does one have to wait until the actual offering?

[38] THE COURT: You mean, as to admissibility of them?

MR. RAUH: Yes, your Honor.

THE COURT: No. Our practice is that when you list them, you list your objections to them, or the sides list their objections to them.

MR. RAUH: To the other side's one.

THE COURT: That's right.

MR. RAUH: But that would not be decided until they were offered at the trial.

THE COURT: That's right.

MR. RAUH: Thank you.

THE COURT: That's to give me a chance to take a look at them in advance and get some preliminary feel about them.

MR. RAUH: The only other question that I have--

THE COURT: And, hopefully, you will, of course, stipulate to foundation as to almost all of them.

MR. RAUH: Oh, yes, I wasn't thinking of objections on the grounds of foundation or that they weren't what they purported to be. I was thinking only of relevance and that would come at the trial after you have stated your ground for irrelevance and pretrial.

THE COURT: That's right.

MR. RAUH: The only other question I have is the witnesses. While all the witnesses are not stated in their pretrial memorandum, there are some witnesses stated, and especially the attorneys on [39] page 35. There's a list of witnesses and it lists all of our attorneys and lists Mr. Merrill. Where one has a question of the relevancy or propriety, should that await the trial, too, sir, or is your practice to try to straighten out ahead of time. I find this rather unlikely to view myself as a witness, and I find it also unlikely that Mr. Merrill can be both counsel and witness, but I didn't know whether this is the proper time to raise that. I'm only asking that because I honestly don't know what your practice is. Back home we could raise that point at the pretrial stage.

THE COURT: I'd be happy to have it raised at the pretrial stage.

MR. RAUH: Maybe Mr. Merrill will explain that.

As far as the issues are concerned, I think they are now clear, and I don't think we are going to have any trouble with that.

On the exhibits we have no trouble because we simply state ours and maybe Mr. Merrill would straighten that out and then there's nothing that I have to raise at this stage.

THE COURT: All right.

MR. MERRILL: I must say we are making astounding progress, your Honor.

THE COURT: We are. I am astounded.

MR. MERRILL: Very pleasing progress here, and I'm taking some hard lumps that's not too pleasing on these issues; I have [40] to confess that and I'm not going to debate the points any further.

On the scope of the chargeable costs, Mr. Rauh did not raise that as an issue. It seems to me that the union sometimes is in agreement with us and sometimes they take a different position. That is to say, they urge Paragraph 22 as the rebatable amounts sometimes, the nonchargeable amount, and then sometimes they say only Western Airlines collective bargaining is the chargeable amount, and there is a vast difference

between those two that I think was clearly articulated in this Court's order of November 29, 1976. It would certainly reduce the documentary proof and the expert accounting testimony considerably if we had absolutely clear that only Western Airlines collective bargaining expense is the chargeable portion. Collective bargaining with other employers and with other employee units is not to be charged to the plaintiffs. Now, that's my understanding.

THE COURT: That's my understanding of my own order.

MR. RAUH: Do you want me to wait, because I wanted to raise a clarification.

THE COURT: Yes.

MR. MERRILL: Mr. Rauh has conceded at several points in his papers and in his arguments that the Policy Statement rebate scheme was deficient. At one point he says it was bad, and at another point he says it was so bad that's why we adopted this new communication rebate, and I think in light of the fact that that [41] was inflicted upon plaintiffs, that it is equally subject to adjudication as were the previous rebates as a breach of the duty of fair representation. We may not get much in the way of relief at this point out of that, but it was a calculated act on the part of the union that was not in accordance with their duty of fair representation and we would ask at minimum declaratory relief to that effect.

THE COURT: As to that original rebate.

MR. MERRILL: As to the Policy Statement of 1974 that President C. L. Dennis issued as a policy statement. You then ruled it was improper. They then enacted it as a constitutional amendment.

THE COURT: But then they changed it when Mr. Rauh got in.

MR.MERRILL: Yes, sir.

MR. RAUH: I think you have already given the declaratory relief, sir.

THE COURT: I think I have, too. I have declared that that was an invalid policy statement.

MR. MERRILL: I can't recall a specific order ruling to that effect. Your summary judgment referred to the fact that it had been adopted but there's no dispositive position relating to it.

THE COURT: You can put one in this pretrial order because it's been covered.

MR. RAUH: It's paragraph 8 of your order, your Honor: "BRAC has further breached its duty of fair representation to **[42]** plaintiffs by the following" and then subitem: "Failing to make dues reductions of three and a third percent excluding agency payers such as Ellis," and if you want to add to that, it's all right with me.

THE COURT: I think it's pretty plain.

MR. MERRILL: Now, sir, we have the question of injunctive relief regarding the payment of strike benefits or the entitlement of agency fee payers to receive strike benefits and, whereas Mr. Rauh has repeatedly assured the Court that they are fully entitled to receive those payments--

THE COURT: He has made that statement in court, without walking the picket line.

MR. MERRILL: Yes, sir, and then seven months thereafter, General Chairman Ernie Mogg, Systems Board, told a local lodge meeting, "You don't get strike benefits unless you walk a picket line." That's in the minutes of a meeting, and we have provided the exerpt of those minutes in our pretrial statement, and we fully intend to offer the minutes themselves.

MR. Rauh earlier said he was not against formalizing this statement that he made about entitlement to strike benefits.

THE COURT: That ought to be formalized in the pretrial order.

MR. MERRILL: We would ask that the Court adjudicate the spending of political and ideological activities as constitutional violations in accordance with Abood. At the present time, **[43]** the sole basis of the Court's holding that those monies were misspent is the breach of the duty of fair representation. I think Abood makes it plain that to the extent there are political and ideological expenditures, it's a First Amendment violation.

THE COURT: I'm not going to make that in the pretrial order.

MR. MERRILL: All right.

THE COURT: I feel much more comfortable--despite Abood, I feel much more comfortable on a statutory basis.

MR. MERRILL: The attorneys' fees issue remains open as to attorneys' fees that may be awardable to plaintiffs. Mr. Rauh opposed those on the grounds of Alyeska and the fact that we couldn't recover them until some appellate process had taken place in this case. We have responded to those in our memorandum and if the Court can give us an indication on tht issue, it will affect the submission of a very substantial amount of proof.

THE COURT: I don't think that I'm going to give attorneys' fees.

MR. MERRILL: Would it be appropriate to inquire of the basis of the Court's inclination on that point?

THE COURT: The language in Alyeska.

MR. MERRILL: On those matters which the Court has ruled out, including that one, what we would propose doing to diminish the burden of trial is to prepare a proffer as we did on the compulsory union membership issue and just submit those into the **[44]** record if that's satisfactory.

THE COURT: That's fine with the Court.

MR. MERRILL: The only remaining issue on my list here is the nature of the relief to be granted, and I don't know that there's really anything that can be resolved in terms of discussions between Mr. Rauh and me and/or respective counsel with the Court. We, of course, feel that full disclosure of all past amounts is appropriate as they cannot and will not be able to establish the amount of misspent monies.

As to the future, we would urge that a temporary injunction be filed which would not foreclose them from collecting collective bargaining monies as soon as they are able to establish the amount that is being spent in accordance with the statute. The money is theirs but the balance is no longer taken out of these plaintiffs' pockets.

THE COURT: I think that decision has got to await the trial, Mr. Merrill.

MR. MERRILL: There are a couple of small points I'd like to clean up as omissions from the pretrial statement which I probably could do in the subsequent submission, but I'll mention them just now.

Our Contention of Fact No. 3 refers to the plaintiffs having begun paying fifteen dollars per month in July 1975. It should read June.

Among our witnesses, we won't have those witnesses now because [45] the Court has ruled that issue out.

We'll have to have someone attest to the amounts of monies paid by these plaintiffs to the defendants over the course of these years. Now, I think tht it's really appropriate for the defendants to establish that given the fact that they have admitted misspending a lot of these monies and they have the records available to them on computer. They can spew them out at a moment's notice. I'm quite sure the Court does not want us to bring in 180 plaintiffs and take your time to say, "Yes, I am a plaintiff. I worked for Western Airlines. I paid this amount of money. I was laid off during this period of time. I went back to work for the union and I paid this amount of dues."

THE COURT: I think I might retract one statement from this morning. I think you can make a request for admission as far as those are concerned.

MR. MERRILL: Unfortunately, I don't have the basis--

THE COURT: You should have all those figures now.

MR. MERRILL: I don't have the facts. I don't know when a given class member may have been laid off. I would think the defendant--

THE COURT: Do you have those on computer tapes?

MR. HIRSH: Your Honor, we have computerized the data, I think, since July of 1975. That's when the new accounting system with the tapes and all went into evidence. For the periods prior to that, we would have to go back to the records but I believe, [46] without having seen them with my own eyes, I believe the per cap tax reports that the local lodges

sent in quarterly to the grand lodge should indicate the amount of dues paid by all the individual members. The only question in my mind is, we have to reach some agreement on exactly who's in this case. We have never fully identified all the people, I think. We have never gotten a list from Mr. Merrill. We have a list of people we have been sending refunds to under our rebate plan, but we don't know if Mr. Merrill agrees that that includes everybody who he believes is in the class.

THE COURT: Certainly you have a list of your class members.

MR. MERRILL: That was set forth in the table of proof of plaintiffs' objections attached to our motion for summary judgment and it identified in that table the source whereby we established that they did register a protest, so there isn't any doubt, if Mr. Hirsh will refer back to that document, as to who we contend is in the class.

THE COURT: That's what I thought. I remember seeing that.

MR. HIRSH: Well, with the list of names, I would certainly make every effort to check our records to see if we can determine when any individual was in layoff status and was not a full dues-paying member.

MR. MERRILL: If we can't get the entirety of the information from them, we may be able to go to Western Airlines and get documentation from them so we'll leave that as one possibility--calling **[47]** a witness from Western.

THE COURT: All right.

MR. MERRILL: The last point is one that was just raised over the weekend by Howard Ellis. He was talking with the husband of a lady who was a class member and who opted out, according to the communication that your clerk sent me, and apparently she misunderstood the notice and did not wish to opt out. She thinks she's still a participant in the case. We are perfectly willing to continue representing her as a class member and to correspond--

THE COURT: She'd better send some correspondence to the Court to that effect then.

MR. MERRILL: Does your Honor desire that I send her a letter, a copy to the Court and copy to Mr. Rauh, advising her of this?

THE COURT: Yes.

Now, what do you expect to get from Mr. Rauh as a witness?

MR. MERRILL: Well, your Honor, that's an interesting question. I'm happy to answer it.

I asked Mr. Kroll, the International President of this union, which indirect expenses were taken into account and how were they taken into account, in calculating these rebates, and Mr. Rauh would not let him answer because he said that only an attorney could answer that question, he being the attorney. Now, if Mr. Rauh is calculating the rebates, I want Mr. Rauh on that witness **[48]** stand.

Mr. Klevens wrote the Board of Trustees report for the 1974 dues rebate. He took the report that the trustees prepared and they trash-canned that one, and then they used his, so I want him as a witness. And Mr. Hirsh obviously was either a participant in, or gave approval for that communication rebate and I want to know what his role in that was.

These gentlemen have served their clients, but they have served them in ways other than representational ways and I think that those are solid examples of the possession of relevant information from them and we expect to go into that.

The other attorneys listed, of course, were listed with regard to the amount of time they'd spent in working on the case, or to be listed or to serve as independent witnesses as to the value of that time.

THE COURT: I think in the trial, the International President will be answering those questions that Mr. Rauh wouldn't let him answer in his deposition, so that you won't need Mr. Rauh.

MR. MERRILL: Well, to the extent--

THE COURT: He will be either answering them or the marshal will be taking him with him.

MR. MERRILL: To the extent that he may prove unable to answer those questions, we'll reserve our right to call defendants' counsel.

THE COURT: Then there will be a failure of proof on their [49] part, isn't there? You'll be in a better position than if Mr. Rauh testifies.

MR. MERRILL: Frankly, I could use a little improvement in my position, having seen the way the issues have fallen here.

Your Honor, I think that disposes of those things that would have been included within the pretrial order. I would be more than nappy to take the transcript and summarize your Honor's rulings on those and prepare a formal document and submit that to Mr. Rauh.

THE COURT: Fine.

MR. RAUH: I did have one or two points, sir, although progress is so great, I don't want to upset it.

When I rose and asked if I should speak then or wait, it was in regard to this problem of exactly what this Paragraph 22 means. I suppose that will have to wait until it's fleshed out at the trial but--

THE COURT: I'm afraid so.

MR. RAUH: --but there is this point: I believe that the disagreement is explainable and it's explainable this way: Mr. Merrill and I think your Honor has stated--that the proposition is that the only thing we can charge a protester is the Western Airlines collective bargaining. I accept that.

THE COURT: Right.

MR. RAUH: Where the issue arises is the degree to which headquarters costs available are Western Airlines collective [50] bargaining. In other words, I made the comment--I think it was the second time previous, the penultimate time I was here; I think it's October--I made the point--or maybe it was the last time in December--I made the point that an army spends so much out in the field, but that you couldn't just say that's the cost of the army. You have to say a certain amount of headquarters, and I think that is where the difference is, but it's a problem that seems to me that can await the trial to see how much I can show that the headquarters cost is properly allocable to Western Airlines.

THE COURT: I think that's true and my present inclination, Mr. Rauh, is that perhaps the only reasonable method of doing that is showing what headquarters does and then just take it as an arbitrary percentage, the Western Airlines dues, as a percentage of the entire dues.

MR. RAUH: I think that is what we were struggling towards in our last answers. I don't say we made it perfect, but I think that is what we are trying to do, and I would suggest that there really isn't as much difference in viewpoint as that and it would be our job at the trial to demonstrate what of headquarters is properly allocable and we will undertake that.

THE COURT: That's right. That's my feeling, too.

MR. RAUH: And I guess the only other point is that we offered a stipulation but maybe instead of arguing that now since we have made so much progress, we'll talk to Mr. Merrill and he **[51]** can decide whether he'll accept it or not. It was on the five-year payment that we were prepared to make.

THE COURT: All right. Why don't you gentlemen confer if you have anything else to work out. I don't need to see you any more today.

MR. MERRILL: There are two or three additional points, your Honor, if I might get one further moment of your Honor's time.

On the headquarters expense allocation, this is a subject that is not novel to us as litigants. We have spent a lot of time over the years talking with accountants about how it can be done, particularly accountants having a knowledge of what goes on at the grand lodge level and I think that the Court would want to reach a result that is fair and accurate, and I think that is going to require the use of acceptable accounting standards and not just, I might say, off-the-hip proportions which I think is what the Supreme Court did in Street. They didn't think about an unbalanced budget. They didn't think about the fact that at the grand lodge level, the union has a very different emphasis in its activities than they do at the local lodge level. Certainly we have seen that here, so I would ask that the Court keep an open mind as to what the formula may prove to be.

THE COURT: Oh, I have an open mind, I think. I just think--I don't know at this time whether the international president uses ninety percent of his time to lobby Congress or what he uses ninety percent of his time

for. Maybe he uses ninety-five percent talking [52] to Mr. Rauh and Mr. Hirsh.

MR. MERRILL: I assume that they will be most desirous of amending their list of witnesses and their exhibits. I hope that they don't, but I expect that they will.

THE COURT: Well, I suggest as far as actual exhibit lists and witness lists, that you might very well--I'll permit you to vary the terms of our Rule 9 and you may submit those separately to the Court and perhaps give you another thirty days after the actual pretrial order for you to do that.

MR. RAUH: That reminds me, your Honor; do you have any idea as to the trial date?

THE COURT: That's the last thing I was going to ask you about. What is your schedule, Mr. Merrill, and yours, Mr. Rauh?

MR. MERRILL: Late March would be preferable for us.

THE COURT: I think we're looking farther than that.

MR. MERRILL: The earliest date.

THE COURT: I would think early June. How about you, Mr. Rauh?

MR. RAUH: I was just saying to myself--

THE COURT: San Diego is a delightful place in the summer. It beats Washington all hollow.

MR. RAUH: Sir, I was just saying to myself: I hope he doesn't say June. I have a friend whose name is John Stewart Service. He was the--

THE COURT: I know of Mr. Service.

[53] MR. RAUH: He has great friends in China and he's leading a group to China. We leave on the 4th of June. Now, obviously, my client comes first and that is something I would give up.

THE COURT: Is that a three-week trip?

MR. RAUH: It's a special one that Mr. Service, because of having friendships there, is able to manage. Actually I think if my heart stands, we're going to Lhasa in Tibet, and this is something I would hate to give up, although I'm not saying I wouldn't.

THE COURT: I won't make you give that up.

MR. RAUH: That's the only time. July or August would be fine, your Honor, if that's the earliest we can do it.

THE COURT: How about the 6th of July?

MR. RAUH: All right, sir.

MR. MERRILL: In light of that delay, would it be acceptable if we have sixty days after the pretrial order to exchange the exhibit list?

THE COURT: Yes, you can have sixty days after the pretrial order to exchange the exhibit list.

MR. RAUH: Mr. Hirsh points out to me that the grand lodge is moving that month. I do feel that--I'm not asking for a delay on that basis. I do feel I'll simply have to tell Mr. Kroll and Mr. Bobo that if I'm to get to China, they have to do this and move at the same time.

THE COURT: I think they can manage that. July 6 at 9:00 a.m. for trial.

(Adjournment.)